

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 521

ANDREW R. MALLORY, PETITIONER

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

I

	Original	Print
Record from U. S. D. C. for the District of Columbia:		
Indictment.....	A	1
Arraignment and plea.....	B	1
Summary of psychiatric findings.....	C	2
Letter report of Dr. Joseph M. Rom, dated July 13, 1954.....	F	4
Letter report of Dr. Addison M. Duval, dated February 24, 1955.....	G	5
Letter report of Dr. W. G. Cushard, dated June 11, 1955.....	H	6
Letter report of Dr. Leon J. Epstein, dated June 13, 1955.....	I	7
Adjudication of competency to stand trial.....	J	8
Transcript of proceedings.....	1	9
Appearances.....	1	9
Testimony of—		
Dr. William G. Cushard:		
Direct.....	23	9
Cross.....	25	10
Dr. Leon Joseph Epstein:		
Direct.....	20	13
Cross.....	31	14
Both sides rest.....	34	15

II

INDEX

Record from U. S. D. C. for the District of Columbia—Con.

Transcript of proceedings—Continued

Original Print

Testimony of—

Stella R. O'Keane:

Direct.....	45	16
Cross.....	60	20
Redirect.....	62	20
Recross.....	62	20

Sylvan Yuter:

Direct.....	103	21
Cross.....	115	23

II

Testimony of—

William A. Elliott:

Direct.....	117	25
Cross.....	123	27

Charles A. Mackie:

Direct.....	125	28
Cross.....	162	44
Redirect.....	175	52

Dr. Richard M. Rosenberg: Direct

178 53

Irma P. Smith:

Direct.....	185	55
Cross.....	192	57

Vernie E. Tate:

Direct.....	193	57
Cross.....	200	57

James K. McCarty:

Direct.....	213	59
Cross.....	218	60

Vernie E. Tate (resumed): Cross

238 63

Charles A. Mackie (resumed): Direct

240 64

Luther R. Mallory, Jr. (recalled): Direct

270 64

James K. McCarty (recalled):

Direct.....	317	68
Cross.....	324	72

Andrew R. Mallory: Cross

407 76

Colloquy between court and counsel

465 97

Charge to the jury

466 97

Verdict

484 107

Reporter's certificate (omitted in printing)

486a 108

III

Verdict

499 108

Judgment and commitment

500 109

Motion for a new trial

502 110

Proceedings in U. S. C. A. for the District of Columbia
Circuit.....

503 111

INDEX

III

	Original	Print
Opinion, Prettyman, J.....	503	111
Dissenting opinion, Bazelon, J.....	509	115
Judgment.....	516	118
Clerk's certificate (omitted in printing).....	517	119
Order allowing certiorari.....	518	119

A [File endorsement omitted.]

In United States District Court for the District of Columbia

Holding a Criminal Term

Grand Jury Impanelled March 1, 1954, Sworn in on
March 2, 1954

Criminal No. 443-54. Grand Jury No. 472-54.

Rape (22 D. C. C. 2801).

THE UNITED STATES OF AMERICA

v.

ANDREW R. MALLORY

Indictment

(Filed May 3, 1954)

The Grand Jury charges:

On or about April 7, 1954, within the District of Columbia,
Andrew R. Mallory had carnal knowledge of a female named
Stella R. O'Keane forcibly and against her will.

LEO A. ROVER,
*Attorney of the United States in
and for the District of Columbia.*

A true bill:

STEPHEN T. PORTER,
Foreman.

[File endorsement omitted.]

[Title omitted.]

In the United States District Court for the District
of Columbia

Arraignment and plea of defendant

(Filed May 14, 1954)

On this 14th day of May, 1954, the defendant Andrew R.
Mallory, appearing in proper person and by his attorney
William B. Bryant, Esquire, being arraigned in open Court
upon the indictment, the same being read to him, pleads not

guilty thereto. The defendant is remanded to the District of Columbia Jail.

By direction of:

EDWARD M. CURRAN,

Presiding Judge,

Criminal Court Number 4.

HARRY M. HULL,

Clerk.

By C. J. RUMSEY,

Deputy Clerk.

Present: United States Attorney.

By JOHN DOYLE,

Assistant United States Attorney.

T. DORAN,

Official Reporter.

C

In United States District Court

*Summary of Psychiatric Findings in the Case of
Andrew Mallory. (C, M, Single, 19 Years)*

(Filed July 14, 1954)

July 12, 1954

This subject was examined in the District Jail on July 5, 1954. He was vague, preoccupied and had a tendency to stare off to the right. The interview, more or less verbatim, was as follows:

"My lawyer says I pleaded guilty to rape."

(Is this why you're in jail?)

"I don't know."

(How long have you been in jail?)

"I don't know."

(A day?)

"I don't know."

(A week?)

"I don't know."

(A month?)

"About."

(When were you arrested?)

"I don't know."

(Street address?) The subject reached into his pocket, then said: "I don't remember." and then, after a moment, said: "In the Southwest."

(With whom did you live?)

"My brother Luther, his wife and children. I guess four."

(How long did you live with them?)

"I don't know. Have you some aspirin? I have a headache."

(Do you often have headaches?)

"Yes. Here."—pointing to frontal region . . . "Practically all the time . . . ever since I can remember."

(What is that on your forehead (a sebaceous cyst)?)

"I don't know."

D (Where were you born?)

"In South Carolina—Speidenberg"—or a word sounding like this—"I don't remember." At this point, he turned his head as if listening.

(Do you hear voices?)

"Yes. They say I raped that woman."

(How long have you heard voices?)

"Here. Lately."

(Are your father and mother living?)

"Yes. I guess."

(Where?)

"I don't know."

(Do you have any sisters?)

"Yes . . . ten."

(Their names?)

"I don't remember. Do you have a cigarette?"

At frequent intervals during the interview he would sit and stare to the right as if listening. Questions would have to be repeated. He became increasingly tense.

(How far did you go in school?)

"Eighth grade."

(How did you do?)

"Did good. Do you have a cigarette?"

(Nine times nine?)

"My head hurts. I don't know."

(Five times five?)

Shook his head, meaning 'I don't know.'

(Two plus two?)

"Four."

(Four plus four?)

"Eight."

E (Four times four?)

"Sixteen."

(President of the United States?)

No response.

A long period of silence followed, during which he stared off to the right and picked at right index finger with his thumb.

(What are you thinking about?)

"I want a cigarette." Another long period of silence. "Why did they send you down here? Why do they think I need a psychiatrist?" Following these remarks, he made some unintelligible comments and walked out of the room.

Opinion

It is my opinion that this subject is suffering from an acute schizophrenic reaction with mixed catatonic and paranoid features. Information available to me at the present time is not adequate to offer an opinion as to whether or not the subject man was mentally ill at the time of the commission of his offense. At the present time, however, he is mentally ill and it is recommended that he be sent to a hospital for further observation and treatment.

John R. Cavanagh, M. D.

JOHN R. CAVANAGH, M. D.

F [File endorsement omitted.]

In United States District Court

Letter report

Filed July 16, 1954.

JOSEPH M. ROM, M. D.

2025 EYE STREET, N. W.

Washington 6, D. C., July 13, 1954.

Judge DAVID A. PINE,

United States District Court,

Washington 1, D. C.

DEAR JUDGE PINE: This report relates to Andrew R. Mallory, upon whom I performed a psychiatric examination on July 7, 1954 in accordance with your court order criminal number 543-54, dated June 29, 1954.

My examination discloses the fact that the defendant is of unsound mind. He is suffering from a mental disease diag-

nosed as simple schizophrenia with mental deficiency. In my opinion, he is incapable of understanding the proceedings against him or to assist properly in his own defense.

I base my opinion upon the following findings in my examination. The patient appeared to be dull, apathetic, and mildly confused. No formal psychological tests were given, but I estimate that his intelligence is that of a moron. His memory is defective as indicated by his inability to remember a simple number span. His intellectual content was low as evidenced by his inability to comment upon simple current happenings. His replies were monosyllabic, indicating a low conceptional capacity. Most significantly, he reported auditory hallucinations. He complained of clear voices calling to him that he has raped a woman. I believe that he is too stupid to simulate such an important psychiatric finding.

In casual references to the electric chair, he indicates that his emotions are not in harmony with his present situation. His behavior in confinement is reported to be not that of a person in an extremely serious predicament.

Very truly yours,

J. M. Rom,
JOSEPH M. ROM, M. D.

G [File endorsement omitted.]

In United States District Court

Letter report

(Filed March 2, 1955)

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE,

SAINT ELIZABETHS HOSPITAL,
Washington 20, D. C.

Re: Andrew R. Mallory, February 24, 1955.

CLERK,

*United States District Court for the District of Columbia,
Washington 1, D. C.*

DEAR SIR: On December 9, 1954 Andrew R. Mallory, Criminal Number 543-54, was admitted to Saint Elizabeths Hospital for a period not to exceed ninety days upon an order of Judge Schweinhaut of the United States District Court for the

District of Columbia. It was, further, ordered that Mr. Mallory be examined by qualified psychiatrists attached to the staff of Saint Elizabeths Hospital in order to determine whether he is presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense; and that reports of the examination should be filed with the Court including statements of the conclusions as a result of said examinations.

Mr. Mallory has been under observation at Saint Elizabeths Hospital since December 9, 1954, and has been examined by several qualified psychiatrists on the medical staff of Saint Elizabeths Hospital. As the result of these examinations we conclude that Andrew R. Mallory is mentally competent to understand the proceedings against him and properly assist in his own defense.

Sincerely yours,

Addison M. Duval,
ADDISON M. DUVAL, M. D.,
Acting Superintendent.

CC: United States Attorney for the District of Columbia,
Washington 1, D. C.

Comm. issued 3/2/54. CJR.

H. [File endorsement omitted.]

In United States District Court

Letter report

(Filed June 14, 1955)

WILLIAM G. CUSHARD, M. D.,
3201 Leland St., Chevy Chase 15, Md.; June 11, 1955.

Andrew R. Mallory. No. 543-54.

The Clerk,

*United States District Court for the District of Columbia
Washington, D. C.*

DEAR SIR: In compliance with an order of the United States District Court for the District of Columbia, signed by Judge McGarraghy, I examined Andrew R. Mallory (Cr. No. 543-54) at the District of Columbia Jail on May 24, 1955.

As the result of my examination I conclude that Andrew R. Mallory is of sound mind, mentally competent to understand the proceedings against him, and to properly assist in his own defense.

Sincerely,

W. G. CUSHARD, M. D.
W. G. CUSHARD, M. D.

I [File endorsement omitted.]

In United States District Court

Letter report

Filed June 14, 1955

LEON J. EPSTEIN, M. D.

2601 Woodley Place, N. W., Washington, D. C.

Re: Andrew Mallory, Criminal No. 543-54, June 13, 1955.

Clerk,

*United States District Court for the District of Columbia,
United States Court House,
Washington 1, D. C.*

DEAR SIR: In compliance with an order for mental examination signed by Judge Joseph C. McGarraghy and dated May 17, 1955, I examined Andrew R. Mallory at the District of Columbia Jail on May 24, 1955.

It is my opinion as the result of my examination that Andrew R. Mallory is not psychotic at the present time and is so mentally competent as to be able to understand the proceedings against him and properly assist in his own defense.

Very truly yours,

Leon J. Epstein, M. D.,
LEON J. EPSTEIN, M. D.

[File endorsement omitted.]

In United States District Court for the
District of Columbia

UNITED STATES

vs.

ANDREW R. MALLORY, *Defendant*

Criminal No. 543-54. Charge Rape

Adjudication of competency to stand trial—

(June 21, 1955)

On this 21st day of June, 1955, came the attorney of the United States; the respondent in proper person and by his attorneys, William B. Bryant and William A. Tinney, Jr., Esquire; whereupon an inquiry by the Court is begun to determine whether or not the respondent is of sound or unsound mind.

It is adjudged by the Court that the respondent is of sound mind and capable of standing trial.

By direction of:

ALEXANDER HOLTZOFF,

Presiding Judge Criminal Court No. 4.

HARRY M. HULL,

Clerk.

By DANIEL J. MENCOBONI,

Deputy Clerk.

Present: United States District Attorney.

By ARTHUR McLAUGHLIN,

Assistant United States Attorney.

EVELYN SWEENEY,

Official Reporter.

1 In United States District Court for the
District of Columbia

Criminal No. 543-54

UNITED STATES OF AMERICA,

v.

ANDREW R. MALLORY, DEFENDANT

Transcript of Proceedings

WASHINGTON, D. C.,

Tuesday, June 21, 1955.

The above-entitled action came on for trial before the Honorable Alexander Holtzoff, United States District Judge, and a jury, at 10:00 o'clock a. m.

APPEARANCES

On behalf of the United States: Arthur J. McLaughlin, Assistant United States Attorney.

On behalf of the defendant: William B. Bryant, Esq., and William A. Tinney, Jr., Esq.

* * * * *

22 The COURT. Let the record show that this hearing is being conducted in the absence of the jury.

23 Thereupon, WILLIAM G. CUSHARD was called as a witness by the United States and, being first sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

Q. Now, Doctor, your full name is what?

A. William G. Cushard, C-u-s-h-a-r-d.

Q. And you are a medical doctor, are you?

A. I am.

Q. Connected with what hospital in town here?

A. Saint Elizabeths Hospital.

Q. Do you specialize in any branch of medicine?

A. I do. In the treatment of nervous and mental diseases, psychiatry.

The COURT. I suggest you speak a little louder.

The WITNESS. Yes, sir. In the treatment of nervous and mental diseases, psychiatry.

By Mr. McLAUGHLIN:

Q. How long have you specialized in that branch of medicine, Doctor?

A. Since 1929.

Q. How long have you been connected with Saint Elizabeths Hospital?

A. Since 1929, same date.

24 The COURT. I think the witness is sufficiently qualified. I don't suppose his qualifications will be questioned.

Mr. BRYANT. No, Your Honor.

By Mr. McLAUGHLIN:

Q. Now, Doctor, at the request of the Court did you have an occasion to examine Andrew Mallory, the defendant here?

A. I did.

Q. When was the last time that you saw the defendant?

A. On May 24, 1955.

Q. What did that examination consist of, Doctor?

A. I examined Mr. Mallory at the District of Columbia Jail for a period of approximately one hour and ten minutes. As a matter of fact, exactly one hour and ten minutes. During that time he was questioned regarding his condition and given the opportunity to make any statement that he wished to make after he had first been informed that the examination was being conducted at the request of this Court.

Q. As a result of that examination, Doctor, did you come to any conclusion?

A. I did.

Q. Are you able to say at this time whether or not the defendant is competent to stand trial of the charges that are pending against him?

25 A. It is my opinion that he is competent to understand the charges and to stand trial and to participate in his defense.

Mr. McLAUGHLIN. I believe that is all.

Cross-examination by Mr. BRYANT:

Q. Doctor, you made no inquiry at the jail about his behavior, did you?

A. I don't believe, to the best of my recollection, that we did. We examined him and he mentioned that he had had some difficulties himself.

Q. Did you follow up on that information you received from him?

A. I don't think I did; no, sir. It was merely his statement.

Q. And you of course knew that the reason he was being examined was because there was some question as to whether or not he knew the nature of the charges and was able to cooperate in his defense, is that so?

A. Yes, I do.

Q. Now, in that connection, Doctor, did you discover anything relative to the defendant and his present situation in terms of counsel?

A. I wonder if you could be a little more specific? I want to be sure I understand.

Q. Did you find out anything as a result of your
26 examination which relates to this man's relationship with counsel?

A. Yes. In the sense that he doesn't trust anyone very much, including counsel. I mean, that's a general distrust of apparently practically everyone with whom he comes in contact.

Q. Is there any special feeling directed to counsel? Did you detect any such thing?

A. I wouldn't say that it was a special feeling, no. He is just the type of person who doesn't trust anyone very much, and apparently that extends to counsel, physicians and others with whom he comes in contact.

MR. BRYANT. I have no further questions, Your Honor.

MR. McLAUGHLIN. I have nothing further.

THE COURT. Anything further?

MR. McLAUGHLIN. No. Does Your Honor care to ask him any questions?

By the COURT:

Q. Doctor, you examined this man, I gather, on prior occasions also?

A. I had known him, Your Honor, during his hospitalization at Saint Elizabeths Hospital; yes.

Q. During what period was he in Saint Elizabeths Hospital?

27 A. If I may refer to some notes?

Q. Surely.

A. He was admitted to Saint Elizabeths Hospital on December 9, 1954, and remained there until March 2, 1955, at which

time he had been reported to this Court as competent to go to trial.

Q. During the period that he was in Saint Elizabeths Hospital, was he found to be of unsound mind at any time? In other words, what I am trying to ascertain, is this a case where the physicians at Saint Elizabeths Hospital found that the defendant was of unsound mind and then he recovered his sanity, or did they find that he was of sound mind all along?

A. The diagnosis was "Without mental disorder" while he was at Saint Elizabeths Hospital. In other words, he was not found to be psychotic during his period at Saint Elizabeths.

Q. In other words, when he was committed for examination at Saint Elizabeths Hospital he was found to be of sound mind at that time?

A. During his entire residence at Saint Elizabeths Hospital, from December 9, 1954, to March 2, 1955, that is correct.

Q. I would like to know why, then, it took three months to reach the conclusion. There is no implied criticism in that question. I just want to know the facts.

28 A. Yes.

Mr. McLAUGHLIN. May I explain that, your Honor? The COURT. Yes, indeed.

Mr. McLAUGHLIN. Your Honor, we originally had a Gunther hearing in this case before Judge Schweinhaut, and two other doctors testified in that hearing. Judge Schweinhaut, after hearing it, wasn't satisfied with the testimony, and he ordered a further examination of this defendant. As a result of that he was sent to Saint Elizabeths where the doctors saw him.

The COURT. No. I am just wondering why it took three months to reach the conclusion.

The WITNESS. He was committed to Saint Elizabeths Hospital for a period of 90 days; or not to exceed 90 days, for observation and examination.

By the COURT:

Q. I see.

A. Actually in many of these cases, particularly where there seems to be some doubt as to mental capacity, we feel it is better to observe them, certainly in my opinion, for a minimum of 60 days, between 60 and 90 days. That is particularly important where there has been a valid question raised as to competency, which there was in this case.

The COURT. Very well. That satisfies the Court.

Mr. BRYANT. May I ask him just one question?

29 The COURT. Yes, indeed.

By Mr. BRYANT:

Q. Doctor, when you had him under your observation, were you aware of the fact that the other two doctors, Dr. Rom and Dr. Cavanagh had found him to be of unsound mind?

A. Yes, I was.

Q. Was that the reason you had some doubt in your mind about him when he came there?

A. Well, I don't exactly use the word "doubt," but after all the man had been found by two doctors, at least in their opinion, to be of unsound mind. Therefore, we felt that he should be given careful and reasonably lengthy study.

Mr. BRYANT. All right, sir.

The COURT. You may step down.

(The witness left the stand.)

Mr. McLAUGHLIN. Dr. Epstein.

May Dr. Cushard be excused?

The COURT. Yes.

Thereupon, LEON JOSEPH EPSTEIN was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

Q. Doctor, your full name is what?

30 A. Leon Joseph Epstein, E-p-s-t-e-i-n.

Q. And you are a medical doctor, are you not?

Mr. BRYANT. Your Honor, I concede Dr. Epstein's qualifications.

The COURT. Thank you.

By Mr. McLAUGHLIN:

Q. Doctor, did you have an occasion to examine one Andrew Mallory?

A. I did, sir.

Q. When did you last examine him, Doctor?

A. I last examined him on May 24th of this year.

Q. 1955?

A. Yes.

Q. As a result of that examination, did you come to any conclusions?

A. I did.

Q. Would you say that the defendant at this time is competent to stand trial?

A. In my opinion he is.

Q. Does he know the charges? That is, is he able to confer with the attorneys in preparation for his defense in this case?

A. In my opinion he is.

Mr. McLAUGHLIN. You may examine.

31 Cross-examination by Mr. BRYANT:

Q. Doctor, you say that in your opinion he is able to confer with his counsel?

A. Yes, sir.

Q. In your opinion, Doctor—do you have an opinion as to whether or not he will or has conferred with his present counsel?

A. You are asking me do I have an opinion as to whether he has conferred or will confer with his counsel?

Q. That is right, sir, his present counsel. Myself, I am talking about.

A. Yes, sir. He evidenced the same sort of doubt and suspicion with respect to yourself as he does with people in general, and tends to assign blame for any predicament he is in or has been in to someone else. He does not do this to the extent that it would be considered part of a severe mental illness, although his amount of suspicion is somewhat more than usual. To that extent it would present some impediment to him fully placing you in his trust. I would say that perhaps that has occurred to some extent.

The COURT. Isn't it a fact that some perfectly normal individuals, but who happen to be ignorant, sometimes mistrust their counsel?

32 The WITNESS. That is quite right, Your Honor. In this particular situation I pointed out that this was so with Mr. Mallory more than one might find usually, but not to the extent one sees in paranoid mental illnesses.

Mr. BRYANT. That's all.

By the COURT:

Q. Doctor, you have had prior occasions to examine this defendant, have you, occasions prior to May 24th?

A. I did, during his hospitalization at Saint Elizabeths Hospital, for a period of 90 days.

Q. Was he under your care in Saint Elizabeths?

A. I was one of the physicians in the psychiatric service where he was hospitalized during this period.

Q. Did you find him mentally ill or of unsound mind during any part of that period?

A. I did not find him so.

Q. In other words, is it your opinion that he was of sound mind at the time he was committed for examination?

A. I believe he was. If I may change that, sir—during his hospitalization, that is from the time I first saw him, prior to that you say, at the time of his commitment in court I couldn't say.

Q. But how soon after his commitment did you first see him?

A. I make an attempt to see a person the day of his arrival in the hospital.

33 Q. Then you saw him on the day of his arrival at the hospital, and at that time he was sane, is that correct?

A. I saw no evidence of severe mental impairment or psychosis.

Q. Is there some mental abnormality? You say there is no severe mental abnormality. Is there some—

A. I would certainly say he is not as well put together from a personality standpoint as one might expect to find. And in the way he responds to stress, and the way he handles himself, of his problems in his everyday living. But I would not say this is present to the degree where I would call it a mental illness.

Q. In other words, he is not psychotic?

A. He is not psychotic.

Q. Would you say he is a psychopath?

A. He shows many of the characteristics of a psychopath. I would say he is.

Q. But a psychopath is competent to consult with counsel and make his defense if there is no psychotic elements, is that correct?

A. That is correct. If there is no psychotic element or if he does not also have a severe incapacitating psychoneurosis.

The COURT. Anything further?

Mr. McLAUGHLIN: I have nothing further.

34 The COURT. You may step down.

The WITNESS. Am I excused?

The COURT. Both doctors may be excused.

(The witness left the stand.)

Mr. McLAUGHLIN. That's all we have on this.

The COURT. Does the defense wish to introduce any testimony on this issue?

Mr. BRYANT. If Your Honor please, I have none except the two doctors. They were appointed by the Court, and I have no professional testimony nor any lay testimony, if Your Honor please.

Both sides rest

The COURT. Very well. Both sides rest, then, on this issue?

Mr. McLAUGHLIN. Yes.

The COURT. The Court finds the defendant of sound mind and competent to stand trial.

45 STELLA R. O'KEANE was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

Q. On April 7th of 1954, where did you live?

A. At 1223 12th Street, Northwest.

Q. Is that in the District of Columbia?

A. Yes, it is.

Q. Who did you live with at those premises?

A. With my husband, Mr. O'Keane.

Q. What apartment did you occupy in that apartment house?

A. 26.

Q. Apartment 26?

A. Yes.

Q. And apartment 26 is located on what floor?

46 A. The second floor.

Q. On April 7th of 1954, did you work that day?

A. Yes; I did.

Q. Where did you work?

A. At Woodward & Lothrop.

Q. All right. What time did you arrive home at that apartment?

A. Around 4:30 in the afternoon.

Q. When you arrived at 4:30 in the afternoon—is that right?

A. Pardon?

Q. You arrived home about 4:30?

A. Yes.

Q. On that particular day, after arriving home at 4:30 did there come a time when you saw your husband?

A. Yes. He came home from work around 5:30 and we had dinner.

Q. All right. What time would you say that you had completed dinner?

A. I had completed dinner around twenty till six in the evening.

Q. At the time that you had completed dinner, did you go any place after that?

A. I went down into the basement to wash clothes.

Q. At the time you went down in the basement to wash clothes, what time would you say that was?

A. That was around about ten till six.

Q. Ten minutes to six?

A. Yes.

Q. When you went downstairs in the basement, did anyone go with you?

A. My husband carried the clothes down for me.

Q. How did he carry the clothes? What I mean by that, were they in a container?

A. They were in a clothes basket; yes, sir.

Q. At the time that you and your husband went downstairs with the laundry, how were you dressed?

A. I was in shorts and a blouse.

Q. What color were the shorts?

A. The shorts were Navy blue.

Q. All right. Did you have anything else on besides the shorts and the blouse?

A. I had my panties on.

The COURT. Your what?

The WITNESS. My panties.

By Mr. McLAUGHLIN:

Q. When you arrived down in the basement, did your husband stay there with you?

A. He stayed long enough to get the washer out of the locker room and pull it out.

Q. The washer?

A. Yes.

Q. What do you mean by the washer?

A. Well, we had our own washer at the time, that we had in the locker room.

Q. You mean the washing machine?

A. Yes, the washing machine.

Q. After he did that, where did he go?

A. He went back upstairs to our apartment.

Q. After your husband went back upstairs, what did you do down in the basement?

A. Well, there was a big hose connected on to the spigot, and I couldn't get the hose off because it had been screwed on too tight. So I knocked on the janitor's door.

Q. Where is the janitor's door?

A. Well, the sinks were here [indicating] and the door was off to the—over that way.

Q. What did you do?

A. I knocked on the door and waited and then someone came out and I asked him would he please try to take the hose off the spigot so I could connect my hose on to put the water in the tubs.

Q. When you told the individual then, what did you do or where did you go?

A. Well, I was standing on this side of the washer,
49 and he was on the other side leaning over the sinks.

I was just standing there and trying to sort the clothes while he took this off, which didn't take long at all.

Q. Are you today able to identify the individual who came out and removed that hose?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. Do you see him in court here today?

A. Yes, sir; I do.

Q. Where is he?

A. He is right over there in back of the gentleman, right here, right there [indicating].

Q. All right. What happened after—

The COURT. Do you want the record to show—

Mr. McLAUGHLIN. May the record show that she pointed to the defendant Andrew Mallory?

By Mr. McLAUGHLIN:

Q. After the hose was removed from the faucet, then where did the defendant go?

A. He went back into the janitor's apartment, in through the door.

Q. What did you do after he went back in that door?

A. Well, I filled the tub with water, and I put my first washing in the tub, and then I went back into the
50 locker room, which is screened off for us to hang our clothes, and I started to take the person had washed before me, her clothes down.

Q. When you started to do that, then what happened?

A. I was clear in the back of the locker room which would be to the front of the apartment house, taking the clothes down, when I happened to glance around, and there was this colored fellow standing about, well, I would say, from about where that water glass is there on the table, with the handkerchief over his face.

Q. All right. What did that individual say, if anything?

A. He hadn't said anything and I screamed. He told me in a very quiet voice to be quiet, two times.

Q. And then what happened?

A. Then he run over to me and he choked me. The next thing I knew I was picking myself off the floor, and then he got ahold of me and started to drag me toward the furnace room. My whole left side was bruised.

Q. Did he take you into the furnace room?

A. Yes; he did.

Q. What happened when you got in the furnace room?

A. Well, he put me down on the floor, and I can remember him pulling my shorts and my underclothes off.

Q. At that time, can you tell us whether or not he
51 had sexual relations with you?

A. Pardon?

Q. Can you tell us whether or not he had sexual relations with you?

A. Yes; he did.

Q. In other words, he penetrated you? You felt his privates in your private parts?

A. Yes, sir; I did.

Q. How long would you say you remained in that position?

A. Well, that I don't know. I mean, that I can't say.

Q. Now, is there any reason why you can't say that?

A. Well, no; it just seemed that I must have blacked out, because I don't know. I can't say how long it would have been.

60 Cross-examination by Mr. BRYANT:

61 Q. Now, there came a time when somebody approached you in a menacing sort of way?

A. Yes.

Q. How did you say his face was dressed?

A. He had a white handkerchief, and it was folded this way [indicating], and he had it—all that showed, all I could see was his eyes, and they were very bright.

Q. You said something about a hat.

A. He had a hat on, yes. And that's all I can remember the way he was dressed.

Q. During the course of the time that you had your experience down there, after he grabbed you, did he ever lose that hat, that you know of?

A. That I don't know.

Q. That you don't remember?

A. No, I don't remember.

Q. The only thing you remember was a pair of bright eyes.

A. Bright eyes and a handkerchief, and a high hat.

62 Q. Now, Mrs. O'Keane, you are not able to say that or you wouldn't say, or would you, that the man who fixed your tub for you and the man who came out there with a handkerchief on his face was the same person?

A. At that time, no. I wouldn't have known it.

Mr. BRYANT. That's all I have. Your Honor.

Redirect examination by Mr. McLAUGHLIN:

Q. Would you say that he fit the same general description?

A. Yes, sir.

Mr. McLAUGHLIN. That's all I have of this witness, Your Honor.

Mr. BRYANT. If Your Honor please, I am afraid I will have to ask another question now.

The COURT. Yes, indeed; you may do so.

Re-cross-examination by Mr. BRYANT:

Q. Mrs. O'Keane, when you say the same general description, can you be a little more specific? Was it in the matter of clothing or general build, or what was it?

A. He was tall. The height.

Q. He was tall?

A. Yes.

Q. Was the——

63 A. For the way he was dressed, I wouldn't know either time because I didn't pay that much attention.

Q. What impressed you was the fact that he was tall?

A. Tall, yes.

Mr. BRYANT. That's all I have, Your Honor.

103 SYLVAN YUTER was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

Q. Now, Officer, your full name is what?

A. Sylvan Yuter, sir.

104 Q. You are a member of the Metropolitan Police Department?

A. I am, sir.

110 Q. Can you recall when and where you arrested him on April 8th, 1954?

A. To the best of my recollection, sir, it was after 2, possibly 2:30 in the afternoon of the 8th, the following day, at 1258 Owens Place.

The COURT. What place?

The WITNESS. Northeast.

By Mr. McLAUGHLIN:

Q. And that's in what section of the city?

A. Northeast.

The COURT. 1258——

111 The WITNESS. Owens Place.

By Mr. McLAUGHLIN:

Q. After you arrested the defendant at that address, where did you bring him? Where did you take him?

A. I then took the defendant Andrew Mallory to police headquarters, sir.

Q. What time would you say you arrived at police headquarters with the defendant Andrew Mallory?

A. Oh, roughly about three o'clock, sir.

Q. Where did you bring him at police headquarters at about three o'clock on April the 8th? Do you recall what part of the building, I mean?

A. I believe we went to the identification bureau room because our office was busy at the time, as best I can recall.

Q. And the identification room is located on what floor in police headquarters?

A. It is on the third floor, sir.

Q. When you say "we" who was with you when you brought him there?

A. Private Jones of No. 2 Precinct, sir.

Q. When you brought the defendant to the identification room about three o'clock did you talk to him?

A. Just briefly, sir.

Q. All right. When you say "just briefly," did you
112 talk to him about the alleged rape on April 7th?

A. I only had a short conversation with him at the time, and I asked him—I told him what he was arrested for, and asked him about the offense. At that time he denied it to me, sir.

Q. All right. What did he say, as near as you can recall?

A. Well, he did say—I asked him if he had ever seen a woman at that address on the night of April 7th. He said that he saw a lady who asked him to fix the washing machine hose for her. She asked him to hook up the hose. He said he did. He said she was a very nice lady. She said, Thank you very much. I asked him if he recalled what the lady looked like or what she was wearing. I say I asked him. I don't remember whether I or one of the officers there with me asked him, but he did say, Yes, the lady had on a pair of blue shorts.

Q. All right. Did you question him further at that time?

A. Now, that was all he said at that time. But he denied that he had ever done anything at all as far as the charge was concerned.

Q. Now, at the time of this questioning of the defendant, who was present? Can you recall?

A. I am pretty sure that Detectives Mackie and Tate
113 were—wait a minute—I believe Detective Elliott was there for one. I am positive he was there. And I believe either Mackie or Tate were there.

Q. How long did you stay in his company at that time?

A. Not very long then; sir. I was called out to the office. There was a person in there to see me.

Q. You went out to the office?

A. Yes, sir.

Q. Did you have an occasion to see the defendant again that night any more?

A. I did, sir.

Q. All right. And when and where was it that you saw the defendant the second time on the night of April 8th?

A. Well, actually I wasn't at the confronting, but that was at the confronting in the Sex Squad office. But I didn't hear what went on back there at that time, sir. I couldn't say.

Q. When was the next time that you saw the defendant?

A. That was later on the same evening, on April 8th.

Q. Approximately what time was that?

A. That was about 10:30, 10:45, when they held the confronting in the Sex Squad office.

Q. When did you see the defendant at that time? I mean, where was it?

A. He was sitting down talking to the complainant.

114 : Q. When you say "the complainant," you mean whom?

A. I mean Mrs. Stella O'Keane.

Q. Was there anyone else present there that you can recall?

A. Well, as well as I can recall, Detective Mackie and Detective Tate were there, and I believe policewoman Goettel.

Q. Anyone else?

A. If there was I don't recall them, sir.

Q. Was Dr. Rosenberg there?

A. I am sorry. Dr. Rosenberg was there.

Q. What did you hear the defendant say, if anything, at that time?

A. I didn't hear what went on there at that time. I was there when Dr. Rosenberg examined the defendant, sir. I am sorry—I had forgotten that part of it. I was there just prior to the confronting when Dr. Rosenberg examined the defendant.

Q. What time would that be?

A. About a half hour before the confrontation.

Q. When you say "the confronting," what do you mean by the confronting?

A. That's when we take the defendant, the complainant, and the pertinent officer in the case and sit down. At that time the complainant is permitted to tell her story to the

115 defendant.

Q. All right. Did you hear the complainant tell her story to the defendant on the night of April 8, 1954?

A. No, sir; I wasn't in a position to hear the whole thing, sir.

Q. You didn't hear it at that time?

A. No, sir.

Q. Now, at any time that night of April 8th did you hear the defendant make any admissions?

A. No, sir; I wasn't in a position to, sir.

Mr. McLAUGHLIN. I believe that's all I have.

Cross-examination by Mr. BRYANT:

Q. Mr. Yuter, you were one of the officers who interrogated this man around about three o'clock, is that right?

A. Just briefly. It was for just a very short time that I talked to him.

Q. Were there any other officers with you at that time?

A. There was in the room. I am trying to recall who they were.

Q. I believe you said——

A. I am pretty certain Sergeant Elliott was there, Mr. Bryant, for one, and I can't recall whether Tate or Mackie were present at that time or not.

Q. Would you say that at least one of them was present?

116 A. I am sure Sergeant Elliott was there, sir.

Q. Were you the only person who was asking the questions?

A. No; I asked him a few questions, and I am sure Sergeant Elliott asked him some questions.

Q. Were you working that day? Were you working daytime?

A. Daytime and nighttime, sir. I worked about 22 hours that particular day, I think.

Q. Let me ask you this: During the time that you were interrogating the defendant, were you on your regular tour of duty, or was it an extra assignment for you?

A. I was working day work, but I don't recall whether it was a split shift or not. You see, two or three times we go in at eight, get off at two, and come back at seven.

Q. During the time you were asking him some questions and he admitted seeing a lady in blue shorts, but he denied molesting her?

A. That's right.

Mr. BRYANT. Your Honor, I have no further questions of this witness.

117 WILLIAM A. ELLIOTT was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

Q. Officer, your full name is what?

A. William A. Elliott.

Q. And you are a member of the Metropolitan Police Department?

118 Q. When was the first time, Officer, that you saw the
119 defendant Andrew Mallory?

A. It must—around 3:45 or something like that on April 8th.

Q. Where was the defendant at that time?

A. He was in the identification bureau, to the best of my knowledge.

Q. The identification bureau is located where?

A. In the third floor of police headquarters.

Q. Were there any other people there in the room with him?

A. The officers around who fingerprint and photograph those men. Lieutenant Sullivan.

Q. Keep your voice up.

A. The officers, the men who are assigned to the identification bureau for the purpose of photographing and fingerprinting people who are brought in.

Q. How long would you say he remained in the bureau of identification?

A. Approximately fifteen minutes to a half an hour.

Q. While he was in that room, did you talk to him?

A. Briefly.

Q. Who was present while you were talking to him, do you recall?

A. Lieutenant Sullivan was one, to the best of my knowledge. And I believe Sylvan Yuter was there.

120 Q. Did you question him in regard to the alleged rape of Mrs. O'Keane?

A. Briefly I asked him about it; yes, sir.

Q. What questions did you ask him that you can recall?

A. I asked him was he there and had he done it. He denied it at that time.

Q. When you say he denied it, what did he say, as near as you can recall?

A. He just said it wasn't him, the best I can recall.

Q. How long did you remain in his presence at that time in police headquarters?

A. Just about the same time he was right there at the identification bureau.

Q. Did you see him any more that night?

A. Yes, sir; I did, later on in the evening.

Q. What time would say that was?

A. Oh, somewhere between ten and eleven.

Q. Who was present at that time?

A. Practically every man in the Sex Squad was present at that time.

Q. Where did you see the defendant at that time?

A. In the office of the Sex Squad.

Q. Where was that?

A. That is Room 3053 in police headquarters, on the third floor.

121 Q. At the time that you saw the defendant was there anyone talking to him, any people, member of the Metropolitan Police Department talking to him at that time?

A. Yes, there were.

Q. Can you recall who was talking to him?

A. I think Detective Sergeant Mackie and Precinct Detective Tate were talking to him, and Lieutenant Sullivan, also.

Q. Do you recall whether there was anyone present there besides members of the Metropolitan Police?

A. Yes, sir.

Q. Who else was there?

A. There was a woman by the name of Betty French who I believe Mrs. O'Keane works with. Dr. Rosenberg, the Deputy Coroner for the District of Columbia was there.

Q. Is that all that was there at the time, that you can recall?

A. That's all I recall. There were others, but I don't recall exactly who they were.

Q. Can you recall whether or not Luther Mallory and Milton Mallory were there?

A. I do, yes, now. They were there.

Q. When did you first see Milton Mallory and Luther Mallory?

A. On the morning of the 8th.

122 Q. Where did you see them at that time?

A. In the office of the Sex Squad.

Q. That's the Metropolitan Police Department?

A. Yes, sir.

Q. Did there come a time when you saw Milton Mallory and Luther Mallory and the defendant Andrew Mallory together at police headquarters?

A. At that time they were in the Sex Squad office, at ten o'clock, between ten and eleven, when I saw them all together.

Q. When you say that you saw the defendant about 10 or 10:30 in the presence of Miss French and Dr. Rosenberg and others of the Metropolitan Police, did you question them yourself personally?

A. No, sir; I did not.

Q. Do you recall whether or not anyone questioned them, and who, in your presence?

A. To the best of my recollection it was Detective Sergeant Mackie and Detective Tate. And Lieutenant Sullivan every now and then would ask a question.

Q. Did you hear the defendant say anything at that time?

A. Yes. At that time he did repeat to the complaining witness, Mrs. O'Keane——

123 Q. What did he repeat to her? What did you hear him say?

A. He told her then that he was the man who had come out of the back room in this basement apartment wearing a mask and he grabbed her and he had taken, raped her.

Q. When you say wearing a mask, did he use the word "mask"?

A. A handkerchief over his face. That is what he had, a white handkerchief.

Q. Did he say anything else at that time as to what he did?

A. Not that I recall.

Q. Was a statement, a written statement, taken from the defendant that night?

A. It was, sir.

Q. Were you present at the time?

A. No, sir.

Mr. McLAUGHLIN. That's all I think I have of this witness.

Cross-examination by Mr. BRYANT:

Q. Mr. Elliott, you say that this man made certain statements to Mrs. O'Keane. Was that a part of what you gentlemen call the confrontation?

A. Yes, sir.

Q. And Mrs. O'Keane had already told him what had happened to her, is that a fact?

A. Yes, sir. She had repeated what had happened, to the best of my knowledge.

Q. And that's of course before he told her that he was the one who had done whatever she had said happened to her?

A. Yes, sir.

Q. And that was about what time? About ten or between ten and eleven?

A. Between ten and eleven, to the best of my recollection.

Mr. BRYANT: Your Honor, I have no further questions of this witness.

The COURT: That's all.

(The witness left the stand.)

125 CHARLES A. MACKIE was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

Q. Officer, your full name is what?

A. Charles A. Mackie.

126 Q. You are a member of the Metropolitan Police Department?

A. I am.

Q. Now, as a member of the Metropolitan Police Department and assigned to the Sex Squad, did you have an occasion to see a person identified to you as Mrs. Stella O'Keane?

A. What date was that?

Q. On April 7th of 1954.

A. No, sir; I did not see her on that date.

Q. Recalling your attention to April 8th, the following day, did you see her?

A. Yes, sir, I did.

Q. Where did you see her on April 8th of 1954?

A. That was in the Sex Squad office.

Q. And the Sex Squad office is located where?

A. The third floor of the Municipal Center Building, across the street.

Q. Is that 300 Indiana Avenue?

A. That is right; yes, sir.

127 Q. At what time would you say that you saw her in the Sex Squad office?

A. On April the 8th that was about 11:07 p. m.

Q. In the evening?

A: Yes, sir.

Q. Prior to seeing her in police headquarters at that time, did you see the defendant here, Andrew Mallory?

A. I did; yes, sir.

Q. When and where did you see him for the first time?

A. I saw him about 3 p. m. April the 8th. It was in the identification bureau in the rear.

Q. Who was present at that time that you can recall?

A. At that time Lieutenant Sullivan, Detective Sergeants Ashley, Weaver, Elliott, Tate, myself, and Detective Yuter.

Q. At that time did you question the defendant Andrew Mallory?

A. No, sir; I didn't question him myself at that time, but I was present.

Q. Was he questioned in your presence?

A. Yes, sir.

Q. Who was he questioned by that you can recall?

A. Sergeant Weaver asked him some questions, and Lieutenant Sullivan asked him a few questions.

128 Q. Do you recall what questions were asked the defendant?

A. No, sir; I don't recall just what questions were asked at that time.

Q. At that time did you know where Milton Mallory was, and Luther Mallory?

A. Yes, sir.

Q. Where were they?

A. They were back there at certain times, and other times they were in the Sex Squad office, but they were on the same floor.

Q. All right. Now, did there come a time when you questioned the defendant?

A. Yes, sir.

Q. Andrew Mallory?

A. I did.

Q. When and where did you question the defendant?

A. That was about 9:45 p. m. April the 8th in the general assignment squad.

Q. Had you been with him from the time you saw him about 3:30 until 9?

A. No, sir; I had not.

Q. Where had you been in the meantime?

A. Well, at 4 p. m. I went home to get something to eat. I returned to the Sex Squad about 7 p. m. that night. I saw him in the Sex Squad office at that time.

129 Q. When you say you saw him, you saw who?

A. The defendant Andrew Mallory.

Q. At the time that you saw the defendant at seven o'clock in police headquarters, who else was there?

A. Lieutenant Sullivan was there; Detective Elliott, Detective Yuter and Tate, and myself. Mrs. Smith who was the police lady attached to our Sex Squad, also.

Q. Where was Milton Mallory and Luther Mallory?

A. They were around in the general assignment squad room with Sergeant McCarty, at different times, separate.

Q. Now, prior to Milton Mallory and Luther Mallory being around with Sergeant McCarty, did there come a time when you saw the three, that is, Milton Mallory, Luther Mallory, and the defendant, in the room together?

A. Yes, sir; I did.

Q. What happened at that time?

A. At that time the defendant was examined by Dr. Rosenberg.

Q. Was there anything else said or done by the defendant and the other Mallorys at that time?

A. Not that I recall.

Q. You say about seven o'clock. Did there come a time when Andrew Mallory went around to Detective McCarty's office?

A. Yes, sir.

130 Q. Was that before or after Luther Mallory and Milton Mallory had been around to see Detective McCarty?

A. That was after.

Q. Afterward?

A. Yes, sir.

Q. Now, prior to them going around there, was there anything said as to why they were going around there?

A. Yes, sir. They had agreed to take a lie detector test.

Q. Who had agreed?

A. Milton Mallory, Luther Mallory, and the defendant Andrew Mallory.

The COURT. Will counsel come to the bench?

(At the bench.)

The COURT. Before we proceed I would like to inquire of the Government whether the Government is planning to introduce any evidence based on any lie detector test.

Mr. McLAUGHLIN. No, Your Honor. What we intend to do, I will tell you at this time, that they agreed to take the lie detector tests. That is the three of them. Then they were sent around to McCarty, and then McCarty when Andrew Mallory went around there, he called Tate and Mackie and said the defendant wants to talk to you. Then the defendant is supposed to have made his confession verbally to them.

131 The COURT. Very well. I will admit that. That's a good deal like the evidence in the Lansburgh's case where the defendant submitted to a lie detector test which wasn't showing anything, and he threw off the apparatus and said, Well, I can't fool that machine, and made a statement.

Mr. BRYANT. If Your Honor please, I understand it is a formidable-looking thing, and I guess everybody is afraid of it.

The COURT. All right. I think I should explain to you gentlemen the reason why I called you to the bench. If there was a real lie detector test here, I wouldn't admit the result of the test.

Mr. McLAUGHLIN. That's true, Your Honor.

(In open court.)

The COURT. You may proceed, Mr. McLaughlin.

By Mr. McLAUGHLIN:

Q. I believe I was asking you whether or not Luther and Milton Mallory went to the office where Detective McCarty was?

A. Yes, sir, they had been there.

Q. And that was before or after the defendant Andrew Mallory went to where McCarty was?

A. Luther and Milton went first.

Q. And then did the defendant go?

A. Yes, sir; he did.

132 Q. Where was the office of McCarty? In what room was it at that time?

A. He was in the general assignment squad.

Q. And where is the general assignment squad?

A. That is on the third floor of 300 Indiana Avenue, about 150 feet from the Sex Squad office.

Q. After the defendant Andrew Mallory went to the office of Detective McCarty, did you see him after that, Andrew Mallory?

A. Yes, sir, I did.

Q. Where did you see him?

A. I saw him about 9:30 or shortly thereafter.

Q. All right. Where was it?

In the general assignment squad office.

Q. How did you come to go to the general assignment office?

A. I was asked to come there by Sergeant McCarty.

Q. When you went to the general assignment room where Officer McCarty was, did you talk to the defendant?

A. I did; yes, sir.

Q. Was there anyone with you in that room beside Detective McCarty?

A. No, sir. At that time it was just Detective Tate, myself, and the defendant.

Q. That's what I said. Tate is somebody. And was 133 Tate present at that time?

A. He was; yes, sir.

Q. Did you talk to the defendant in the general assignment office at the time?

A. I did; yes, sir.

Q. What was said by you and what was said by the defendant Andrew Mallory, if anything?

A. When we went there the defendant told us that he was the one who had attacked the woman.

Q. All right. What did he say?

A. He stated that the woman came to him, knocked on the door that evening; that he came to the door. She asked something about a hose. She was there washing. He fixed the washing machine, went back into the apartment, laid down, and got to thinking about the woman. He went out through the boiler room door, said he put a handkerchief over his face.

and he indicated as to covering up everything but his eyes and his forehead, and came out. The woman was in the drying room. He grabbed her and threw her down, and there was some screaming.

He ran upstairs to the door leading to the basement and locked it. After he came back downstairs and he said the woman had got on her feet again, and he grabbed her again, and half carried her and half dragged her back into the boiler room where he said he had intercourse with her, after
134 tearing her clothes off.

Q. Did you ask him how long or how much time that consumed?

A. He said about ten minutes.

Q. Now, in that conversation did he say if the lady said anything, if the complaining witness said anything to him during the time?

A. Yes, sir. He said that when he first came up that the woman wanted to know if he wanted some money. He told her, No, that he wanted some of her body.

Q. What time would you say that he made that statement orally to you?

A. That was shortly after 9:30 p. m.

Q. Now, after that statement was made to you and McCarty and Tate, what did you do with the defendant Andrew Mallory?

A. The defendant was brought from the general assignment squad around to the sex squad, and about 10:45 p. m. the defendant was examined by Dr. Richard Rosenberg. And about 11:07 p. m. the defendant was confronted by the complainant. The defendant at that time admitted in front of the complainant, Detective Tate and myself—there was also present a Mrs. French who is a friend of the complainant—and also Dr. Rosenberg was there.

Q. Did he repeat to you at that time the same thing
135 he told you down in the general assignment office?

A. Yes, sir, with the exception that in the general assignment office he stated that when he helped the woman to her feet after the attack that she put on a robe which I believe was a purple robe, and ran up the steps. At the time of the confronting he stated that he believed the robe to be pink. That was about the only difference in the story.

Q. What did you do after you confronted the defendant,

that is the complaining witness, in the presence of Dr. Rosenberg and Mrs. French? Did you do anything else with them after that?

A. Yes, sir. After that he was asked if he wanted to put his statement into writing. He agreed to do so. A written statement was taken from him at that time.

Q. Now, was there anything done before the written statement was taken? I mean, did you have an occasion to leave headquarters with him?

A. Yes, sir. After the statement was taken we asked him about the clothing.

Q. What clothing?

A. The clothing that was worn by him at the time of the attack. He said the clothing was in the apartment where he lived, and he gave us a written statement giving us permission to go to the apartment.

Mr. BRYANT. If YOUR HONOR please, I am objecting
136 to this.

Mr. McLAUGHLIN. Have you got the written statement there?

The WITNESS. Yes, sir; it is in the other room, the witness room.

The COURT. What is the basis for your objection?

Mr. BRYANT. Your Honor, I believe at this time my objection—

The COURT. Suppose you state your objection at the bench. You may come to the bench.

(At the bench.)

(The previous question and answer were read by the reporter.)

The COURT. What is your objection?

Mr. BRYANT. At this point I raise my objection to any so-called permission to go to the premises and take anything that belonged to him, and also to the admission of any written statements made by this man, on the theory that he was not in such shape as to consent to anything. I think this is a seasonable time. Maybe I am late.

The COURT. No; this is a seasonable time.

Mr. McLAUGHLIN. You mean mentally?

The COURT. I feel this way, Mr. McLaughlin, that he gave permission is a conclusion.

Mr. McLAUGHLIN. I have the statement. I will offer it. I will qualify it.

The COURT. In other words, I want to know just what was said. I will draw the inference whether there was permission or not.

Mr. McLAUGHLIN. Surely, Your Honor. I intend to do that. (In open court.)

By Mr. McLAUGHLIN:

Q. Now, you say, Officer, you were questioning the defendant about clothes; is that right?

A. Yes, sir.

Q. When and where were you questioning him about the clothes?

A. That was after the statement was obtained from the defendant.

Q. You mean the written statement or the oral statement?

A. The written statement.

Q. Just tell us what was said to the defendant leading up to the questioning about the clothes.

A. We asked where were the clothing which were worn by him at the time. He stated they were in the apartment. We asked him at that time could we go get them. He said yes.

Q. To go where and get the clothes?

A. To the apartment at 1223 12th Street.

Q. What did he say to that?

138 A. He said yes.

Q. Did you make any promises of any kind to him?

A. No, sir.

Q. Were any threats made at that time?

A. No.

Q. Any coercion of any kind?

A. No, sir.

Q. Would you say that the consent was given to you freely and voluntarily on the part of the defendant?

A. Yes, sir.

Q. Just tell us how did it come that this request, or the consent, rather, was reduced to writing? What did you say to the defendant about that?

A. We asked him would he give us written permission to go there and obtain the clothing.

Q. To go where?

A. To go to 1223 12th Street, Northwest.

Q. And for what purpose?

A. To obtain the clothing which was worn.

Q. All right. What did he say to that?

A. He said that he would.

Q. How was it reduced to writing?

A. It was typed, I believe, by Mrs. Smith, and the defendant signed it.

Q. Have you got it there?

139 A. Yes, sir, I believe so.

Q. Let me see it.

(Statement handed to counsel.)

The COURT. Are you offering this in evidence?

Mr. McLAUGHLIN. In another question, Your Honor, in view of my friend's objection.

The COURT. Suppose you lay the foundation and offer it in evidence, and I will rule on this matter.

Br. Mr. McLAUGHLIN:

Q. Now, from the first time that you saw Andrew Mallory up until the time that this permission was given to you, how long would you say that he was in your presence, on and off?

A. Well, I did see him in the day from about three to four p. m., and at night on and off from seven.

Q. During that time did you question him, and did others question him in your presence?

A. Yes, sir.

Q. And during that time when those questions were asked by the others and you, would you say that his answers were coherent?

A. Yes, sir.

Q. Was he rational all the time?

A. He was; yes, sir.

Q. Was there anything at all about his talk, actions or demeanor of any kind that would indicate that he didn't
140 know what he was doing?

A. No, sir, I don't think so.

Q. What would you say, from your observation of this defendant over that period of time, as to the time that he signed this permission to search his apartment, that he was of sound or unsound mind?

A. I would say that he was of sound mind.

The COURT. Are you offering that document?

Mr. McLAUGHLIN: I will at this time, Your Honor, after showing it to Mr. Bryant.

The Court. Very well.

Counsel may come to the bench.

(At the bench.)

Mr. BRYANT. If Your Honor please, I am going to object to its admission on this theory: I think that under the doctrine of the Judd case and the Higgins case—

The Court. The Judd case is the case I have before me.

Mr. BRYANT. Your Honor, I don't believe that that is looked upon as a voluntary consent.

The Court. Mr. McLaughlin, what do you say about that?

Mr. McLAUGHLIN. Well, I think the Judd case—of course, as I say, going back to the foundation is merely because of the fact that he is under arrest, that in itself doesn't say
141 that he can't consent either to a written confession or consent.

Now, the way they give the Judd case, it is about a fellow being locked up at two o'clock in the morning. They say that there he didn't give them any definite permission. In other words, the wording wasn't definite enough. He gave them permission to go there, but didn't say to search, as I read the Judd case.

The Court. Of course, I had the Judd case. Judge Clark dissented. With all due deference to the Court of Appeals, I disagree with the Court of Appeals.

Judge Washington, in his opinion says that the defendant said to the police officers, "I have nothing to hide. You can go there and see for yourself." Yet the Court of Appeals held that this was not a voluntary consent.

Mr. McLAUGHLIN. By the way, in regard to that statement, I think they say in the Higgins case where that statement is made, that a guilty man wouldn't make that statement.

The Court. Well, of course, a guilty man might do just that. He might say, I have got the stuff hidden so well they will never find it, and if I give them my consent I create an impression that I am innocent.

Mr. BRYANT. It is bravado.

The Court. Of course, it is just lack of practical
142 contact. I want to be practical about this thing. What did they find on this search?

Mr. McLAUGHLIN. They got those garments there.

The COURT. Of what importance are these in this case?

Mr. McLAUGHLIN. Also the officer went to the boiler room and got some of the dust or something and turned it over to the FBI and the FBI will say that dust from these and dust from the pants and that dust are similar. But they will go so far as to say this, that dust could come from another place because it is characteristic——

The COURT. Is that of any importance to this case?

Mr. McLAUGHLIN. And the other important thing is that on the pants some spermatozoa will be found, on the pants and the coat and I think the shorts.

The COURT. That's important. The other part isn't. I will tell you right now, Mr. McLaughlin, if I am called upon to rule on this, I am going to rule that you have made a prima facie case of a voluntary consent. But I also want to call your attention to this situation, and you can think it over overnight. In the light of the Judd Case, do you want to run the risk of putting all that in?

Mr. McLAUGHLIN. As I say, the only thing that we can go by—we always instruct the police department to try to get it in writing because that is the practice of the FBI,
143 Your Honor.

The COURT. I think that is an excellent idea. But in view of the fact that you have a written confession——

Mr. McLAUGHLIN. Yes; Your Honor.

The COURT. Wouldn't it be better for you not to present these? However, you must make your own decision.

Mr. McLAUGHLIN. If Your Honor has some doubt, I will forget about it.

The COURT. I have no doubt about it myself.

Mr. McLAUGHLIN. I understand, Your Honor.

The COURT. It all depends on what Judges of the Court of Appeals happen to sit on this case.

Mr. TINNEY. Which three.

The COURT. Yes, exactly. If you have got a good case without it, it seems to me that it would be good policy not to press this. However, my own intellectual integrity requires me to decide according to what I think is right, according to the facts. If you press this offer I will rule on it and rule that at this time you have made out a prima facie case that the consent was signed voluntarily. Of course, that is subject to rebuttal at the proper time.

I don't know how important that evidence is in the case.

Mr. McLAUGHLIN. I am just trying to think.

Mr. BRYANT. You want to think about it overnight?

144 The COURT. I think this is a good time—

Mr. McLAUGHLIN. I can finish in the next five minutes with other questions.

The COURT. All right. You can finish up everything else except this and leave this.

Mr. McLAUGHLIN. I can go to 3:30.

The COURT. All right.

(In open court.)

The DEPUTY CLERK. Do you want me to mark that?

Mr. McLAUGHLIN. 5.

The DEPUTY CLERK. Government Exhibit No. 5, for identification.

(Written consent signed by defendant was marked for identification as Government Exhibit No. 5.)

By Mr. McLAUGHLIN:

Q. Now, Officer, I believe you testified that the statement was reduced to writing, is that right, the defendant's statement?

A. Yes, sir; it was.

Q. Just tell us how the statement was reduced to writing. In other words, what I want is the mechanics of how the statement was reduced to writing. Do you understand what I mean?

Mr. BRYANT. If Your Honor please, I suspect that I have to object to this, in line with my recent objection to
145 the other matter. I believe this is completely seasonable at this time.

The COURT. It seems to me that the proper time to note that objection—I think you had better come to the bench, gentlemen.

(At the bench.)

The COURT. Your objection is taken about voluntariness?

Mr. BRYANT. Yes; Your Honor.

The COURT. We will have to have a preliminary hearing.

Mr. McLAUGHLIN. You mean the fellow didn't have the mental capacity?

Mr. BRYANT. That's right.

The COURT. If it is a question of mental capacity.

Mr. McLAUGHLIN. It is not a question of force.

The COURT. I want to make it clear, and to clarify my own thinking. Is your objection based on mental capacity or lack of voluntariness?

Mr. BRYANT. On both bases at this time in light of the circumstances.

The COURT. Do you claim that the statement was not voluntary?

Mr. BRYANT. Yes; Your Honor.

The COURT. Then I think I am required to hold a
146 preliminary hearing, in the absence of the jury.

I think then that we will suspend at this time until tomorrow morning. I suggest tomorrow morning you indicate to the Court at the opening of court whether you want to press the offer, and if you decide to do so, perhaps you want to finish up with that aspect of the matter before we go into this written statement. If you decide not to do so, which might be the part of caution and wisdom, by then we will take this matter up.

155 Direct examination by Mr. McLAUGHLIN:

Q. Will you state your name?

A. Charles A. Mackie.

The COURT. I suggest, Mr. McLaughlin, in the interest of brevity that all that is needed at this stage is the testimony of the circumstances surrounding the procuring of the statement. The details of what was said of course need not be gone into at this time. All I have to do is to determine the voluntariness or involuntariness of the statement.

By Mr. McLAUGHLIN:

Q. Recalling your attention to the evening of April 8, 1964, I believe you testified that you left Police Headquarters approximately what time that afternoon or evening?

A. I left Police Headquarters about 4 p. m.

Q. And you say you returned approximately what time?

A. At 7 p. m.

Q. And at 7 p. m. who did you see at Police Headquarters?

A. I seen the defendant Andrew Mallory and several police officers who were in the sex squad at that time.

Q. Were the other two Mallorys there, Luther Mallory and Milton Mallory?

156 A. Not at that time; no, sir. I believe that one of them may have been there, but, I don't recall whether or not he was.

Q. After you arrived back at headquarters when and where did you see the defendant?

A. He was in the sex squad office when I returned about 7 p. m.

Q. Did you talk to him at that time?

A. No, sir; I didn't.

Q. Did he go any place from the sex squad office?

A. Yes, sir. He went to the general assignment squad.

Q. Who was in the general assignment squad?

A. Sergeant McCarty is the only one I know was there at the time.

The COURT. Don't let your voice go down.

The WITNESS. Sergeant McCarty, he was the only one there at that time that I know of.

By Mr. McLAUGHLIN:

Q. After you saw the defendant go to the general assignment squad where Sergeant McCarty was, did there come a time when you saw the defendant, Andrew Mallory, after that?

A. Yes, sir; I did.

Q. Just explain in detail under what circumstances you saw the defendant, and what happened.

157 A. Sergeant McCarty came to the sex squad office; asked for Detective Tate and myself; said to go to the general assignment squad, that Andrew Mallory wanted to speak to us. We went to the general assignment squad, Detective Tate and myself, and talked to Andrew Mallory.

Q. Was there anyone in the general assignment squad at the time you went there, as a result of the information received from Officer McCarty?

A. Sergeant McCarty walked around with us but left us, and at the time we talked to him there was just the defendant, Detective Tate, and myself.

Q. Go ahead now, and just repeat what was said by you or what was said by the defendant.

A. The defendant was asked if he had anything to tell us, and he said that he did, and he went on to tell about the actual rape.

Q. And then what was said or done after that?

A. After that he was taken back to the office of the sex

squad where he was examined by Dr. Richard Rosenberg. That was about 10:45 p. m. on April 8th. Following the examination he was confronted by the complainant.

Q. The complaining witness?

A. The complaining witness.

Q. In reference to being confronted by the complaining witness just tell us what did you hear there?

158 A. During the confrontation the defendant told the complaining witness what he had done on the previous evening.

Q. At that time was the complainant the only lady in the sex squad room?

A. No, sir; she was not.

Q. How many other women were there?

A. Well, there were several women in the office. Miss Goettel was there; also Mrs. Smith, who was not actually present during the confrontation. There was Miss French, the friend of the complainant, who actually was there during the confrontation.

Q. Did the defendant do anything or say anything as to the identity of the woman he raped?

A. Yes, sir. He was asked to pick out the woman, and he said that the complainant, and he pointed to her and said that that was the woman.

Q. Prior to that had anybody in that office identified that woman to him?

A. Not to my knowledge; no, sir.

Q. And prior to the defendant's statement to the complaining witness as to what happened on the evening of April 7th, had the complaining witness made any statement to the defendant or in the defendant's presence as to what happened on April 7th?

A. Not to my knowledge; no, sir.

159 Q. What happened?

A. Well, he stated that he was in his apartment—

Q. Did he make a statement in the presence of the complaining witness at that time?

A. Yes, sir, he did.

Q. And then after he made the statement to the complaining witness as to what happened, what was done next?

A. After that we asked him if he wanted to reduce the statement to writing. He was advised of his rights.

We told him that the statement would have to be voluntary and we would put it down in his own words; that his statement could be used for or against him in court, and he agreed to give the statement.

Q. Just tell us the mechanics of taking the statement.

A. The statement was taken by Mrs. Smith, who as near as humanly possible—

Q. When you say was taken by her, what I want are the mechanics of it. Did she seat herself by the typewriter and was the defendant brought over by the typewriter, and what happened along those lines.

A. Yes. Mrs. Smith sat at the typewriter. The defendant sat right alongside of her and I was close myself, seated, as was Detective Tate, when the statement was taken.

Q. Just tell us the process of the statement. What did Miss Smith ask him, questions, or did the defendant go
160 on verbally, that is, orally? Tell us what happened.

A. The only question that Mrs. Smith asked, to the best of my knowledge, was asked him how he wanted to start it, and he asked if it would be all right to start "Some time around 5 o'clock?" And Mrs. Smith said that would be all right, and his statement began from there. From then on the defendant gave the statement, and at the end of his statement I believe Detective Tate asked him one or two questions, which the defendant answered.

Q. And how long would you say that it took to reduce the statement to writing?

A. About an hour; possibly a little longer.

Q. And after the statement was reduced to writing then what happened?

A. After that the defendant was asked about the clothing.

Q. Was it signed by the defendant—the statement?

A. The statement was signed by the defendant; yes, sir.

Q. And was it witnessed by anyone?

A. It was. It was witnessed by Mrs. Smith, Detective Tate and myself.

Q. After the statement was reduced to writing and signed by the defendant, then what next happened?

A. After that the defendant was asked about the
161 clothing which was worn at the time of the assault. He said of course it was in the apartment. And we asked him about getting the clothes. He said that he would take us there. And Mrs. Smith prepared a little statement that he

would give us permission to go to the apartment and get the clothing.

The defendant signed the statement giving his permission to go to the apartment and get the clothing, and Detective Tate and myself and the defendant went to the apartment on Twelfth Street, at which time the defendant pointed out certain articles of clothing which he said he wore at the time of the assault, and we filed those as evidence.

Q. During any of that time that evening did you or anyone else in your presence make any promise to the defendant to make this statement or to give his consent to search his premises?

A. No, sir.

Q. Was any coercion used by you or anyone in your presence?

A. No, sir.

Q. Or any threats of any kind?

A. No, sir.

Q. During the time that you talked to the defendant on that night of April 8, 1954, did you have any trouble understanding him?

162 A. No, sir; I didn't.

Q. As far as you know did he have any trouble understanding you or others who talked to him?

A. No, sir.

Q. Was there anything about his general appearance that would indicate to you that he was suffering from any mental illness?

A. No, sir.

Q. And from your observation of the defendant over that period of time, and your talking to the defendant, what would you say as to his soundness or unsoundness of mind at the time he made the statement to you, and also the time he gave you permission to go to his house to get the clothing?

A. I would say that he was of sound mind; that he was alert and very cooperative.

Mr. McLAUGHLIN. I believe that is all I have.

Cross-examination by Mr. BRYANT:

Q. Mr. Mackie, after this statement was typed by Mrs. Smith—

The COURT. Suppose we mark it for identification.

Mr. BRYANT. It has already been marked, if Your Honor please.

The COURT. Then for the purpose of the record, suppose you refer to the number.

163 By Mr. BRYANT:

Q. Mr. Mackie, I show you what has been marked Government's Exhibit No. 5 for identification, which is the alleged consent statement. Was that statement read to the defendant before he signed it? Do you remember?

A. I don't recall.

Q. Now, I believe you told Mr. McLaughlin that the defendant sat down and picked Mrs. O'Keane out as the woman that he had molested; is that right?

A. Yes, sir.

Q. And you said that prior to that time no one had pointed Mrs. O'Keane out. Is that a fact?

A. Not to my knowledge.

Q. Now, Mr. Mackie, as a matter of fact, this defendant had been confronted with Mrs. O'Keane at that time, had he not?

A. Yes, sir; they were all together at that time.

Q. Yes, but I am speaking specifically now of what you and the sex squad office call the confrontation. You are familiar with that procedure?

A. Yes, sir.

Q. And there had been a confrontation in that office between the defendant and Mrs. O'Keane, isn't that a fact?

A. Mrs. O'Keane didn't utter a word during that confrontation.

164 Q. Let me ask you this. In a confrontation the plaintiff sits down and tells what happened to her, doesn't she?

A. Normally, yes.

Q. Was there anything abnormal about this particular confrontation?

A. Yes. At this confrontation the complaining witness did not tell exactly what happened. In fact, she was asked not to say anything at that time.

Q. Did there come a time when the complaining witness did tell what happened?

A. No, sir, I don't believe so.

Q. So she never sat down before this man and told him what happened to her on that night?

A. No, sir; I don't believe so.

The COURT. She was asked not to say anything. Mr. Bryant. Did I understand you correctly?

The WITNESS. Yes, Your Honor.

By MR. BRYANT:

Q. Was Mr. O'Keane there at that time when this man picked Mrs. O'Keane out? Was Mr. O'Keane there?

A. No, sir. I don't believe he was in the immediate vicinity?

Q. Was Mr. Tate there?

A. Yes, sir.

165 Q. Was Dr. Rosenberg there?

A. He was; yes, sir.

Q. And of course Mr. Sylvan Yuter was there, was he not?

A. Not close by; I don't think.

Q. When you say "close by," give me some idea of what you mean.

A. I would say that he was in the room, but I don't believe that he took part in the confronting.

Q. Well, this happened some time between 10:20 and 10:45, didn't it?

A. The confronting?

Q. Yes.

A. No, sir. The confronting was after 11 p. m.

Q. Let me ask you, when did you get down there, down to the sex squad?

A. About 7 p. m. that night.

Q. And were you there until the confronting took place?

A. Yes, sir.

Q. And you were present at the confronting?

A. Yes, sir.

Q. And you say Mr. Yuter wasn't there?

A. I say he was in the room but I don't think he actively took part in the confronting.

166 Q. Well, you first saw the defendant around 3 o'clock, did you not?

A. About that time; yes, sir.

Q. And then you and Officer Elliott and several more were in the sex squad office at that time?

A. No, sir. We were in the Identification Bureau in the rear of that place.

Q. Well, you didn't question him there, did you?

A. I did not; no, sir.

Q. Did anybody, to your knowledge?

A. Yes, sir. There were Lieutenant Sullivan and Sergeant Weaver was doing the questioning.

Q. And there came a time when you went home, isn't that a fact?

A. Yes, sir.

Q. At the time that you went home was anybody questioning this defendant?

A. I don't know, Mr. Bryant. I left the Identification Bureau and returned to the sex squad office at which time I was told that I could go home at that time and to return later.

Q. When you did leave the presence of the defendant he was being questioned, is that so?

A. Yes, sir; they were talking to him.

Q. You went home and got some dinner, I believe, and
167 came back?

A. Yes, sir.

Q. And about what time did you come back?

A. About 7 p. m.

Q. And at that time this defendant was being questioned by several officers, isn't that a fact?

A. No, sir. At that time, to the best of my knowledge, he was sitting in the sex squad office.

Q. Well, what was he doing in there?

A. Just sitting. He was waiting to go down to the general assignment squad.

Q. Who was there with him?

A. Well, there were several detectives in the sex squad bureau at that time.

Q. Lieutenant Sullivan?

A. Yes; I believe he was there.

Q. Mr. Elliott?

A. I believe he was there.

Q. And Mr. Yuter and Mr. Tate?

A. Yes, sir.

Q. And these men were there, that is, around 7 o'clock, right?

A. Yes, sir.

Q. And you say they weren't questioning him at that time?

168 A. No, sir; I don't believe anyone was at that time.

Q. When there came the time to go around to Mr. McCarty's office—that is the general assignment office, is that so?

A. Yes, sir.

Q. That's where they have this lie detector machine, is that right?

A. Yes, sir.

Q. Who went first?

A. Detective Tate and myself went together and Sergeant McCarty walked there with us.

Q. No, no; I am sorry I confused you.

I believe both Luther and Milton Mallory went around to Mr. McCarty?

A. Yes, sir.

Q. I mean separately, is that right?

A. Yes, sir.

Q. And then I believe the defendant went around there; right?

A. Yes, sir.

Q. Which one of the Mallorys went around there first?

A. I don't know.

Q. How long approximately, did he stay, whoever it was that went first?

A. I don't recall; somewhere around an hour.

169 Q. Around an hour?

A. Yes.

Q. And then when he came back the other Mallory went around?

A. I believe so.

Q. How long did he stay?

A. Approximately an hour.

Q. During that period of time, sir, did you know where the defendant was?

A. To the best of my knowledge he was in the sex squad office and remained there until such time as he went to the general assignment squad.

Q. During that two-hour period, Mr. Mackie, did you or any of the officers in your presence have any conversation with this defendant?

A. No, sir, not to my knowledge.

Q. You were working on the case, weren't you?

A. Yes, sir.

Q. And you were assigned to the case, weren't you? You and Mr. Tate?

A. Yes, sir.

Q. Your major assignment?

A. Yes, sir, among others.

Q. And you were there?

A. Yes.

170 Q. When you say, to the best of your knowledge, is there any doubt about this testimony?

A. No. I didn't talk to him.

Q. Was Mr. Tate in the office with you?

A. At times; yes, sir.

Q. Well, did the defendant say anything to anybody during that two-hour period?

A. Not to my knowledge; no, sir.

Q. Well, again, did he say anything, or did he not? You were there, weren't you?

A. Yes, sir; I was there, in and out at times.

Q. You never saw him say anything to anybody?

A. No, sir.

Q. Can you tell us as best you can just what he was doing?

A. The times I observed him he was sitting.

Q. He was by himself? When I say "by himself" I mean nobody was sitting alongside of him; is that right?

A. There may have been a time that one of the Mallory boys was sitting alongside of him.

By the COURT:

Q. Was there an officer sitting alongside of him?

A. No, sir.

Q. There was no attempt to guard him?

171 A. Well, the officers were in and out of the sex squad. There is always someone present, Your Honor.

By Mr. BRYANT:

Q. He wasn't toward the front office, was he?

A. No; in the back.

Q. There is no door back there, of course?

A. No, sir.

Q. Mr. Mackie, there came a time when this man made a statement, you say, to Mrs. Smith, who typed it; right?

A. Yes, sir.

Q. And I believe you said that he was seated right alongside, close by Mrs. Smith?

A. Yes, sir.

Q. And you and Mr. Tate were seated right nearby; is that right?

A. Yes, sir; we were nearby.

Q. Tell us if you can—I assume that the defendant was sitting at least as close to Mrs. Smith, who was operating as a stenographer, is that right?

A. Yes, sir.

Q. He was sitting at least as close to her as I am to the clerk; is that right?

A. Yes; I would say so.

Q. How close to Mallory were you sitting?

A. Three or four feet away.

Q. Almost as close as he was to Mrs. Smith?

172 A. Yes, sir.

By the COURT:

Q. Was the statement taken stenographically or was it taken right on the typewriter?

A. Right on the typewriter, Your Honor.

By Mr. BRYANT:

Q. Then Mr. Tate was sitting close by; is that right?

A. Yes.

Q. Let me ask you this question. Have you any idea how long it was—and I am asking for your best recollection approximately—between the time that Mallory went around to see Mr. McCarty and the time that Mr. McCarty sent for you and Tate?

A. I would say near an hour.

Q. You would say it was nearly an hour?

A. Yes, sir.

Q. You said Mr. McCarty came and got you?

A. Yes, sir.

Q. When you went back to the general assignment office, who was there?

A. The only one I recall seeing was the defendant himself.

Q. And there was nobody left to watch him, or anything?

173 A. I don't recall anyone else being in the room at that time.

Q. When you say "in the room" describe the room. Is it a big room, the big room of the general assignment office?

A. No, sir. The lie detector room is a fairly small room, I would say possibly 12 by 15.

Q. That is the room off from the main office?

A. Yes, sir.

Q. And it was there that you saw the defendant?

A. Yes, sir.

Q. Describe him as he was as you saw him at that time.

A. He seemed to be alert at that time, and as I said he was very cooperative.

Q. Where was he sitting, or was he sitting when you went into the lie detector room?

A. There was a seat in there; he was seated at the time.

Q. How close was that to the machinery?

A. Well, it would have to be within a few feet because actually there is not too much room in there.

Q. Most of that room is taken up with the machine, isn't it?

A. A good bit of it.

Q. The machine as a matter of fact is a pretty large
174 sort of business.

A. The machine itself isn't too big, but the desk that it sits in is quite a large desk.

Q. And was this man connected up with the machine?

A. No, sir; not at that time.

Q. The connections to the machine were right there in plain view, is that so?

A. I would say so; yes, sir.

Q. And you say he was around there about an hour?

A. Somewhere around that time; yes, sir.

Q. Let me ask you this. Is Mr. McCarty here?

A. I believe he is in court.

Q. Do you know whether this man was put on the machine?

A. No, sir; I don't know that.

The COURT. What do you mean by "put on the machine"?

Mr. BRYANT. Was he put on the machine. In other words, do you know whether or not this man was subjected to the test?

The COURT. Oh, well, that is a little different.

Mr. BRYANT. I am sorry. I didn't mean to import any violence.

The COURT. I know you didn't, but I want to keep the record clear.

Mr. BRYANT. Yes, sir; I am sorry.

175. By Mr. BRYANT:

Q. Do you know whether or not the defendant went through the test on the lie detector?

A. Personally, I don't know.

Q. Have you any information on that score?

A. No, sir. The only information I have of course was when Sergeant McCarty came to the sex squad office and said the defendant wanted to speak to us.

Mr. BRYANT. Will Your Honor indulge me a second?

The COURT. Surely. Take whatever time you need.

Mr. BRYANT. Your Honor, I believe that is all I have of this witness.

The COURT. Is there any redirect examination?

Redirect examination by Mr. McLAUGHLIN:

Q. During that period of time that you were there at Police Headquarters, did the defendant have something to eat?

A. Yes, sir. He was asked at one time if he wanted anything to eat. He said that all he wanted was a Coca Cola and I believe some chewing gum, which was given to him.

Q. Was there anything else given to him at the time?

A. No, sir. I have no knowledge of anything else other than asking him if he wanted to eat.

Q. Recalling your attention, after the defendant stated to you that he made a verbal statement, you stated he
176 made a verbal statement, was there any attempt at that time to get in touch with the United States Commissioner?

A. Yes, sir. Sergeant Elliott made a call to the home of the United States Commissioner, and the Commissioner was unavailable at that time.

Q. And that was approximately what time on April 8th?

A. It was some time after 10 o'clock.

Mr. McLAUGHLIN: I believe that is all.

By the COURT:

Q. When you say that the Commissioner was not available do you mean that he wasn't there, or do you mean that he was there but was unable to take the matter up? Which was it?

A. Sergeant Elliott talked to the wife of the Commissioner, and that was what he told me, that the Commissioner was

unavailable at that time. I didn't go into it any further with him.

Q. There are two questions I would like to ask the witness.

Would you explain under what circumstances and for what purpose the defendant was taken from the sex squad office to the general assignment office?

A. Your Honor, he was taken from the sex squad office to the general assignment squad for the purpose of the lie detector test.

177 Q. How did the idea of the lie detector test originate?

A. Some time after 4 p. m. the detectives who were working on the case asked the defendant and Luther Mallory and Milton Mallory if they would take the lie detector test, and all three agreed.

Q. One other question I want to ask you.

You testified, I believe, that during part of the time when the defendant was in the sex squad office he was seated by himself and the detectives were in the room. What were the detectives doing at that time, in a general way?

A. Just taking care of certain things they had to do; routine business, Your Honor.

Q. In other words, they weren't there for the purpose of questioning the defendant?

A. Not at that time, Your Honor.

178 DR. RICHARD M. ROSENBERG being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

Q. Doctor, your full name is what?

A. Richard M. Rosenberg.

Q. And you are a deputy coroner for the District of Columbia, is that right?

A. That is right.

Q. Recalling your attention to April 8, 1954, do you recall seeing a party identified to you as Andrew Mallory?

A. I do.

Q. And when did you first see that individual, doctor?

A. At 10:45 p. m., April 8, 1954.

Q. And where was the defendant at the time that you saw him?

A. In the office of the sex squad at Metropolitan Police Headquarters.

179 Q. And who else was present at that time? Can you recall, Doctor?

A. Officer C. A. Mackie and Officer V. E. Tate.

Q. At that time, Doctor, did you have occasion to talk to the defendant?

A. I did.

Q. And can you recall the nature of your conversation with the defendant?

A. I can if I can use my notes which I made at the time.

Q. You made the notes at the time?

A. That is right.

Mr. McLAUGHLIN: Have you any objection?

Mr. BRYANT: No; I have no objection to the doctor referring to his notes.

The COURT: Very well.

A. (Continuing.) The defendant said he had been brought to headquarters about 2:30 that afternoon.

I asked him if he had been treated well. He said Yes, that he had not been struck or threatened; that no promise of any kind had been made to him other than that he would receive a fair break.

He said he felt O. K. and had no complaints except that he had a slight cold.

180 He said at 5 p. m. that day he had some soup, bread, also a couple of cokes and chewing gum; that he had been given plenty of cigarettes. Also he had been taken to the toilet whenever he wished.

He said he had been treated well by everyone, and got up a little after 11 that day, and was not exhausted.

I asked him if he would remove his clothes in order to be examined, and he said he would, and he did.

There were no marks of injury anywhere, and during the examination the pubic hair, the hair on the lower part of the abdomen, was combed by me in an effort to find if there were present any foreign hairs. The result of that examination was turned over to Officer Tate.

By Mr. McLAUGHLIN:

Q. How long a period of time did you talk to the defendant?

A. Probably about a half hour.

Q. And did you have any trouble understanding him: Doctor?

A. No.

Q. Would you say that he was alert?

A. Yes.

Q. Would you say that he had any trouble understanding your questions?

A. No.

Q. Was there anything about his outward appearance
181 that would indicate to you that he was suffering from any mental illness?

A. No.

Q. Was there anything from the questions you asked him and his answers to you, that he was suffering from any mental illness?

A. No.

Q. Would you say from your talk with the defendant, and your observation of him over that period of time, that he was of sound or unsound mind?

A. So far as I could determine; yes.

Q. He was of what?

A. Of sound mind.

Mr. McLAUGHLIN. I believe that is all.

185 Thereupon IRMA P. SMITH being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN.

Q. Your name is Mrs. Irma Smith?

A. Yes, sir.

Q. And you are a member of the Metropolitan Police Department?

186 Q. If you will, Mrs. Smith, just tell us in your own way, and in detail, just the mechanics of taking that statement; just what was done and what was said and who said it.

A. Mr. Mallory took a seat beside a desk at which I was seated. He was advised by Mr. Mackie and Mr. Tate that he could give a statement voluntarily if he wished to do so; and in my presence he said that he wanted to.

So I explained to him that if he would talk slowly and clearly and loud enough that I would write down whatever he told me to on the typewriter.

He asked, Well, where do you think we should begin? And I told him that I thought that he should begin as nearly to the main incident, or happening, that would make it clear to someone else.

So he began talking, and as he talked along I wrote it as nearly as I could. If he went too fast I would ask him to please slow up, and if there was any doubt about hearing I would repeat it and if it weren't correct he would tell me "I say so and so" and we would write it down just as he was talking.

Q. You mean you were actually taking it on the typewriter?

A. As he spoke.

Q. And did he then voluntarily make a statement?

A. Yes, sir.

187 Q. And you took it down on the typewriter?

A. Yes, sir.

Q. And after the statement was taken and reduced to writing was it read to the defendant or shown to him?

A. I asked him could he read. He said that he could. And so he was given the statement to read, and I asked him to read all of it, everything that was written thereon.

Q. Was the statement signed by the defendant in your presence?

A. Yes, sir.

Q. And was it also signed by you?

A. Yes, sir.

Q. How long a period of time would you say that it took to reduce that statement to writing, if you can recall?

A. I believe we began the statement about 11:30 p. m. on April 8th, and the statement was completed about 12:25 a. m., April 9th.

Q. In other words, the time is on the statement itself, is that right, Mrs. Smith?

A. Yes, sir.

Q. During the time that you talked to the defendant, and the defendant talked to you, did you have any trouble understanding him?

A. He spoke very well.

Q. And did he have any trouble understanding you,
188 as far as you knew?

A. As far as I knew he had no trouble because he had no questions.

Q. No questions?

A. No questions.

Q. And was he alert during that time?

A. Quite alert.

Q. Was there anything about his general demeanor or appearance or the way he talked that would indicate that he was suffering from any mental illness?

A. Not in my opinion, sir.

Mr. McLAUGHLIN. I believe that is all.

192 Q. When you went home they were talking to him?

A. At 6 o'clock? To the best of my recollection they were.

Q. At that time that this man sat down next to you and gave you this statement, Officer Mackie and Officer Tate were there, were they not?

A. Yes, sir.

Q. And were they sitting—were you and the defendant and Mackie and Tate sitting in a group, so to speak?

A. I am here [indicating] and the defendant was sitting right there, and Mr. Mackie and Mr. Tate was sitting behind us.

Q. And one of them behind him and one of them behind you, approximately, is that right?

A. Just the distance of a chair or so, not touching each other, but not too far away.

193 VERNIE E. TATE being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

Q. Officer, your full name is what?

A. Vernie E. Tate.

Q. And you are a member of the Metropolitan Police Department?

200 Cross-examination by Mr. BRANT:

Q. Officer Tate, before this man told you he wanted to talk to you around at Mr. McCarty's office, you and

Mr. Mackie and perhaps some other officers had questioned him, isn't that right?

A. Briefly, earlier in the evening; yes.

Q. When you say briefly, what do you mean?

A. Well, as far as I am concerned, I think it was about 20 minutes. That was about 3 o'clock in the afternoon.

Q. Lieutenant Sullivan and Mr. Elliott and Mr. Yuter questioned him too at some time, didn't they?

A. Well, they were all present at the same time at this 3 o'clock talk.

Q. What happened after the 20 minutes that you questioned him? Then where did you go?

A. Sergeant Mackie and I were sent home and told to report back to the office.

Q. He was being questioned when you left, wasn't he?

A. I believe he was getting something to eat at that time.

Q. When you came back he was being questioned?

201 A. He was around in the general assignment office, yes—he could have been.

Q. You came back around 9 or 9:30?

A. I believe it was around 9, between 8 and 9.

Q. Do you know what happened when you were away?

A. No.

Q. During the time you questioned this man, Mr. Tate, you asked him about that basement around there, didn't you, on Twelfth Street?

A. Which time are you referring to?

Q. Any time before he made his statement to you. How many times did you question him?

A. Just at 3 o'clock and again about 9:30. Neither time, did I mention anything about a basement; no, sir.

Q. What did you ask him at around 3 o'clock?

A. At 3 o'clock I think all the questions I heard directed to Mr. Mallory was by Sergeant or Lieutenant Sullivan, and it all had to do with his activities on the previous day and evening, and just what he had done, and there weren't too many questions asked.

Q. Were there any questions asked of this man which might let him or anybody else know that he was being questioned in connection with a rape charge?

A. Well, he inferred to us that he knew about it, sir.

202 Q. How did he do that?

A. Because his brother Luther had told him. That he told us at 3 o'clock.

Q. What did he say?

A. His brother, Luther Mallory, had told him that when he returned some woman had been attacked and beaten in the basement, and he was told by Luther to get out of this apartment and leave until things quieted down a little bit.

SERGEANT JAMES K. McCARTY being first duly sworn was examined and testified as follows:

214 Direct examination by Mr. McLAUGHLIN:

Q. Sergeant, your full name is what?

A. James K. McCarty.

Q. And you are a member of the Metropolitan Police Department?

A. Yes, sir.

Q. Calling your attention to April 8, 1954, did there come a time when you saw a person identified to you as Andrew Mallory?

A. Yes, sir.

Q. And just where were you at the time?

A. In the general assignment squad room in the Detective Bureau, sir.

Q. And approximately what time would you say this person identified to you as Andrew Mallory was brought in, the approximate time, officer?

A. I first saw him about 6 p. m., sir.

Q. And where was he at that time?

A. Seated alongside the west wall of the room.

215 Q. Of what room?

A. Of the general assignment squad room.

Q. Was there anyone else with him at that time?

A. Yes, sir.

Q. Who else was with him at that time?

A. There were three other men with him at that time.

Q. Can you recall who those other men were?

A. I recall that two of them had the same last name, and the other was possibly the same last name, but a relative, is my recollection, sir. It is a long time ago.

Q. Did there come a time when you tested the defendant Andrew Mallory?

A. Yes, sir.

Q. With the lie detector test?

A. Yes, sir.

Q. Was he the first one or did you test others prior to him?

A. I examined two prior to the defendant.

Q. And how long would you say that you spent with the defendant in the room, that is, Andrew Mallory?

A. I believe about an hour and a half, beginning shortly after 8 o'clock.

Q. That is with the defendant Andrew Mallory?

A. Yes, sir.

Q. And as a result of talking to him there in the room, 216-217 what did you do?

A. I asked him if he would be willing to tell Detective Tate and Detective Mackie what he had told me about the case.

Q. And what did he say to that?

A. He said, Yes, he would.

Q. And then what did you do?

A. I asked those two officers to come into the room.

Q. And did they come into the room?

A. Yes, sir.

Q. And did he talk to them in your presence?

A. For a few minutes I remained in the room asking him to tell these officers what he had told me. I only remained a few minutes. I left the room and took no further part in the investigation.

Q. And during the time that the defendant Andrew Mallory was in your presence did you make any promises to him that if he made a statement that consideration would be shown him?

A. I did not.

Q. Did you threaten him at any time?

A. No, sir.

Q. Was any coercion used upon him by you to make the statement?

A. No, sir.

218 Q. Was the statement made to you freely and voluntarily?

A. Yes, sir; it was free and an expression of sorrow.

Q. What do you mean by that?

A. He stated several times how sorry he was that this happened.

Mr. McLAUGHLIN. I think that is all I have to ask him.

Cross-examination by Mr. BRYANT:

Q. I gather that when you asked the defendant whether he would make a statement to Mr. Tate and Mr. Mackie and tell them what he had told you, that he had made certain admissions to you; is that a fact?

A. That is right, sir.

Q. Sergeant McCarty, would you tell us as briefly as you can, but at the same time as completely as you can, just what went on between you and Mallory, the defendant here, after he was brought to your room for the purpose of the testing? Can you tell us how that went?

A. Yes, sir.

Q. Please.

A. I first talked with the defendant shortly after 8 p. m. He expressed a desire to take a lie detector test to show these officers that he had nothing to do with the case. He signed a statement to that effect.

219 I discussed the case with the defendant for 15 or 20 minutes. I then conducted the examination which consumed a total period of time while asking questions on the machine of about 20 minutes, consisting of three short series of questions.

After completing this test he continued for some period of time to deny any knowledge of the case except what had been told, and denying any part in it himself.

After some few minutes further he stated that he might have done it. Then finally, expressing how sorry he was for what he had done, he told me that on the previous evening a white lady had knocked on the door of the room in which —

Mr. McLAUGHLIN. Your Honor, I don't want to cut him off, but I believe that is the part Your Honor isn't interested in.

The COURT. If I admit the evidence we will have him back and we will have the details of the statement. What we are interested in now are the circumstances.

By Mr. BRYANT:

Q. Now, Sergeant McCarty, after he ran through these series of questions you continued to interrogate him, is that right?

A. I continued discussing the case with him; yes, sir.

Q. How long did it take you to put him in position to
220 be tested with this machine, I mean, hook it up?

A. Actually, you speak of hooking it up, it is a matter of a very few moments.

Q. Very few minutes?

A. Moments.

Q. Did he show any apprehension about that type of arrangement?

A. He appeared anxious to take the examination.

Q. Anxious to take it?

A. Yes, sir—a nervous tension about him to a degree.

Q. There was some nervous tension about him?

A. Expressing that he wanted to take it just for showing these officers he had nothing to do with the case.

Q. During the time he actually took it, did anything unusual appear about him to you during the time he actually took the examination?

Excuse me; I don't want to confuse you. I don't have in mind the reading on your machine; I mean your general observation of him; how did he appear during the actual taking of the test?

A. You mean physically, his physical or psychological reaction?

Q. Physically, did you see any sign of high nervous tension at all?

A. Not to any marked degree; no, sir.

221 Q. As you took him off the testing apparatus, when you discontinued your testing apparatus and continued to interrogate him, did you have any impression that there was any high nervous tension with him?

A. He appeared worried and expressed shortly thereafter sorrow for what he had done.

Q. Was that before or after he said "I might have done that." Was that before or after that?

A. There was nothing very unusual in the manner or behavior as would vary from many other people that I deal with.

It may be that I don't understand exactly what you are asking me to refer to.

Q. I wanted to ask you whether or not this man gave you—

Your Honor, Mr. McLaughlin might have asked this question, I don't recall.

The COURT. That is perfectly all right.

By Mr. BRYANT:

Q. Did this man give you any impression that he was not a normal individual under the same circumstances, considering his circumstances? Did he give you the impression that he was abnormal in any respect?

A. Not so far as I know. I wouldn't consider myself qualified to—

222 Q. I don't mean from a psychiatric point of view.

The COURT. As a layman, in other words.

Mr. BRYANT. Yes, Your Honor. Thank you.

A. It appeared to be within reasonable bounds of normal behavior.

Mr. BRYANT. That is all. Thank you.

Mr. McLAUGHLIN. That is all.

The COURT. You may step down.

(The witness left the stand.)

238 VERNIE E. TATE, the witness on the stand at the time of taking the recess, resumed the stand, and testified further as follows:

Cross-examination by Mr. BRYANT:

239 Q. Now, Mr. Tate, please tell me, I believe you started examining this man around 3 or a few minutes before 3 in the identification room?

A. Yes.

Q. And you spent about maybe 20 minutes with him?

A. Yes, sir.

Q. And then you went home?

A. Yes; I left the building.

Q. And then you didn't interrogate him any more until after Mr. McCarty sent for you, is that right?

A. That is correct.

Q. And at that time you say he made certain admissions to you?

A. Yes, sir; that is right.

Q. Were you in the defendant's presence at any other time during that afternoon, at which time other officers in the sex squad interrogated him?

A. At the confronting later in the sex squad office.

Q. Let me put it this way: Prior to the so-called admissions made to you, I mean up to about the time you went around to the large place, did anybody interrogate him in your presence?

A. Not in my presence; no, sir.

Mr. BRYANT. I believe that is all I have with Mr. Tate.

240 CHARLES A. MACKIE, a witness called by the United States, having been previously sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION

253 Q. During the evening there of April 8, 1954, after the defendant had made a verbal statement to you, did there come a time when you got in touch or tried to get in touch with the United States Commissioner?

254 A. Yes, sir. That was done not by me personally.

Q. Can you recall the approximate time that was done?

A. Shortly after 10 p. m.

Q. On the night of April 8, 1954?

A. That is right.

Q. When was the defendant finally arraigned?

A. He was arraigned on April 9, 1954.

By The Court.

Q. At what time?

A. I don't know the time exactly, Your Honor.

Q. Was it in the morning or in the afternoon?

A. I think it was in the morning, Your Honor.

270 LUTHER R. MALLORY, Jr. was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

271 Q. After you were brought to the sex squad office did there come a time when you saw Andrew Mallory?

A. Well, later on that evening I saw him.

Q. What time did you see him?

A. Well, somewhere between 3 and 4 o'clock I think before I saw him.

Q. And when you saw him at 3 or 4 o'clock where was he?

A. I believe he was in the office, the sex squad office.

Q. And were you in the same office?

272 A. I was; yes.

Q. Was there anyone else in that office at that time?

A. My brother Milton was in there and some other officers.

Q. And were you questioned at that time?

A. Not at that time; no, sir.

Q. Was Andrew Mallory questioned at that time, in your presence?

A. No, sir; I don't think he was.

Q. What were you doing, just sitting there?

A. Well, at the time I was.

Q. Did there come a time when there was some discussion about a lie detector test?

A. Yes, there was.

Q. What time was that?

A. I am not sure about the time. It was sometime late that afternoon, but I am not sure.

Q. Can you give us some idea as to the time?

A. I don't know, it must have been after 5 o'clock.

Q. After 5?

A. Yes, sir.

Q. And that is p. m., in the evening, is that right?

A. Yes.

Q. And that discussion of a lie detector test was taking place whereabouts in the building?

273 A. In the office of the sex squad.

Q. And who was in that discussion?

A. Well, there would be some of the detectives was in there.

Q. I meant were you one of those who were discussing about the lie detector test?

A. Yes. He asked me if I would take a lie detector test.

Q. What did you say?

A. I told him I would.

Q. And was Milton asked that question?

A. Yes, sir.

Q. And was the defendant Andrew Mallory asked that question?

A. Yes, sir.

Q. And what did they say?

A. They stated they would, they would take the test.

Q. That was about what time?

A. I don't know the exact time. I think it was some time after 5 o'clock, I am not sure.

Q. After 5?

A. Around or after 5.

Q. After it was agreed by the three to take a lie detector test, was anyone immediately given the lie detector test?

274 A. Not immediately; I don't think.

Q. Was there any reason told you or the others why it wasn't?

A. For one reason we ate afterwards, I mean between that time.

Q. You ate?

A. Yes, sir.

Q. Who ate?

A. Well, I did, for one.

Q. And did Andrew Mallory eat in your presence?

A. I am not sure if he did or not. I have forgot it if he did.

Q. Who bought the food?

A. They brought it from somewhere in the building there.

Q. Did they ask you what you wanted to eat?

A. No, sir; they didn't ask what we wanted.

Q. They brought it?

A. Yes.

Q. After you ate was there any discussion about the lie detector test?

A. Well, the next thing was I think he called my brother Milton in first to take the test.

Q. Was there any discussion at that time as to whether the man was present who could give the lie detector test?

275 A. I think he must have after we had some food, I think he was there then. I don't think he was present when he first asked him.

MR. BRYANT. I don't think that is quite responsive.

• MR. McLAUGHLIN. I will ask a direct question.

By MR. McLAUGHLIN:

Q. Was there anything said immediately after the three of you agreed to take the lie detector test why it wasn't given to you immediately?

A. Well, like I said, I am not sure, but I don't think the man was there to give it.

Q. Why do you say that?

A. We had to wait for a while.

Q. How long did you have to wait?

A. Like I say, I think it was around 5 o'clock or a little afterward when they mentioned taking the lie detector test and then it was later on.

The COURT. Speak up loudly.

The WITNESS. It was later on.

By Mr. McLAUGHLIN:

Q. When you say "later on" what period of time?

A. I don't know, sir. I was there but I didn't have any way of keeping time.

Q. Was it an hour, half an hour, or a quarter of an hour?

276 A. It was more than an hour, I think.

Q. During that hour what did you, Andrew Mallory, and Milton Mallory do in the sex squad office?

A. Just sat there.

Q. Just sat there waiting?

A. Yes, sir.

Q. After that hour had passed did there come a time when someone of the three of you left the sex squad room?

A. Yes, sir.

Q. And which one left?

A. You said during that hour or afterward?

Q. After the hour.

A. Oh, my brother Milton left first.

Q. And when he left how long did he stay away from the room?

A. Well, I would say between 45 minutes and an hour.

Q. And during the 45 minutes or the hour that Milton was out of the room were you and Andrew still in the sex squad room?

A. Yes; we were.

Q. Was there anyone questioning you or Andrew at that time?

A. No, sir.

Q. You just sat there waiting, is that right?

A. Yes, sir.

277-300 Q. When Milton returned to the room, to the sex squad room, did anyone else leave the sex squad room?

A. Yes, sir, I did myself.

Q. And when you left the sex squad room where was Andrew Mallory?

A. He was still in the office there.

Q. How long did you remain out of the sex squad room?

A. About the same time, 45 minutes or an hour, I think.

Q. And then did you return to the sex squad room?

A. Yes; I did.

Q. And when you left the sex squad room where did you go?

A. To the room where they gave you the lie detector test.

Q. And when you returned to the sex squad room did you see Andrew Mallory?

A. Yes; he was there.

277-300 Q. All right. Then what happened to him?

A. Well, he went after I came back.

Q. He went after you?

A. Yes.

Q. Were you there when Andrew Mallory returned to the sex squad room?

A. Yes. I was there.

317 JAMES K. McCARTY was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

Q. Officer, your full name is what?

A. James K. McCarty.

Q. And you are a member of the Metropolitan Police Department?

A. Yes, sir.

318 Q. Recalling your attention to April 8th of 1954, did you see a person identified to you as Andrew Mallory on that date?

A. Yes, sir.

Q. Can you recall the approximate time that you saw him?

A. For the first time about 6 p. m.

Q. Where was he at that time?

A. Seated in the general assignment squad office.

Q. Did you talk to him at that time?

A. No, sir.

Q. Who was with him at that time, can you recall?

A. Milton Mallory, a brother of Milton's, and Andrew Mallory, and a fourth person that I don't at this time recall, but there were four seated together.

Q. Did there come a time when you did talk to the defendant Andrew Mallory?

A. Yes, sir.

319 Q. At what time would you say that was?

A. Shortly after 8 p. m.

Q. Prior to talking to Andrew Mallory, had you talked to Luther Mallory and Milton Mallory?

A. Yes, sir.

Q. When you talked to Andrew Mallory, did you talk to him in regard to an alleged charge of rape?

A. I did, sir.

Q. On 12th Street, Northwest, in the District of Columbia?

A. Yes, sir.

Q. What did he tell you, if anything, about that?

A. He stated that he was not responsible, that he knew nothing about it other than what he had been told by the officers investigating the case; and that he would like to take a lie detector examination to show those officers that he had nothing to do with it.

Q. All right. You talked to him further after that conversation?

A. Yes, sir.

Q. What was the next conversation you had with him?

A. We discussed the case. I obtained from him information as to his age, place of birth, extent of education, and what pertinent information I could about him personally.

Q. Was he cooperative at that time?

320 A. Yes, sir.

Q. Did you have any trouble understanding him?

A. No, sir.

Q. His talk?

A. No, sir.

Q. Was he alert?

A. Yes, sir.

Q. And after receiving that information did you question the defendant further?

A. Yes, sir.

Q. All right. What questions did you ask him, and what was his response, as near as you can recall?

A. He continued denying any guilty knowledge of the case in question.

Q. What conversation did you have with him, and what did he say, and what—yes, I will stop there.

A. Possibly I don't understand your question, sir. Are you referring—

Q. I say, did you have a further conversation with him?

A. Yes, sir.

Q. All right.

A. I was with him for a total time of about one and a half hours, the two of us alone. During that period of time I did conduct a polygraph examination.

Q. We can't go into the examination itself. What
321 you meant, you talked to him over that period of time, is that right?

A. Yes, sir.

Q. Did there come a time when you talked, after talking to the defendant Andrew Mallory, that you had an occasion to call or talk to Officer Mackie?

A. Yes, sir.

Q. Just what conversation did you have with the defendant prior to the time that you talked to Officer Mackie?

A. Shortly before the expiration of this one and a half hours, Andrew first stated that he could have done this crime, or that he might have done it. He finally stated that he was responsible, and went into some detail as to what actually did occur.

Q. Do you recall the details that he went into?

A. Yes, sir.

Q. All right. Tell us what he told you.

A. He stated that on the previous evening at about 6 p. m. he was in the janitor's quarters of this building, and a lady dressed in shorts knocked on the door and requested him to help her with a washing machine that was not working properly; that he did help her, fixing a hose, I believe, a water hose.

He then returned to the janitor's quarters. My recollection
322 is that he stated he laid down on the bed for a period of time, thinking about this lady that he had helped with the washing machine; that his description was that he wanted that lady; that he then came out of the

janitor's quarters and grabbed the lady around the waist, and removed her to another part of that basement. I believe he said a furnace room or coal room, furnace room, I believe, is what he stated.;

And either before moving her back to the furnace room or immediately afterward, he stated that he locked a door. I believe it was at the top of a set of steps. He returned to her and had sexual intercourse with her; that there was very little conversation; that after this act was completed, the lady put on a robe and walked upstairs; and that he went back into the janitor's quarters after getting his hat which he had dropped at some place in the basement; that he changed some of his clothing, and shortly thereafter left the building.

Q. Was it after that conversation to you that you called Officers Mackie and Tate?

A. Yes, sir.

Mr. McLAUGHLIN. I believe that's all I have of this witness.

The COURT. Will counsel come to the bench?

(At the bench.)

323 The COURT. Mr. McLaughlin, I observe from my notes that when you called this witness in the preliminary hearing outside of the presence of the jury, you concluded his testimony by eliciting testimony to the effect that this statement was a voluntary statement. I don't know whether you want to elicit it at this point.

Mr. McLAUGHLIN. I will ask him.

The COURT. It is for you to decide.

Mr. McLAUGHLIN. I will ask him.

(In open court.)

By Mr. McLAUGHLIN:

Q. Now, at any time, Officer McCarty, while Andrew Mallory was in the general assignment office, and in your presence, did you at any time make any promises to him that if he made the statement any consideration would be shown him?

A. No, sir.

Q. Did you make any threats as to him making the statement?

A. No, sir.

Q. Any coercion used by you?

A. No, sir.

Q. Would you say the statement was made to you freely and voluntarily?

A. Yes, sir.

Mr. McLAUGHLIN. That's all.

The COURT. You may proceed, Mr. Bryant.

324 Cross-examination by Mr. BRYANT:

Q. Mr. McCarty, around six o'clock in the evening of April 8th, where were these people when you first saw them? When I say "these people" I mean Andrew Mallory and his two relatives.

A. Seated in chairs alongside the west wall of the general assignment squad office.

Q. Do you know how they came to get there or be there?

A. No, sir. They were with some other officers, some members of my squad at that time, when I entered the room.

Q. I believe you said that at that time you had no conversation with any one of the three of them.

A. Other than possibly I spoke to them.

Q. No official conversation?

A. No, sir.

Q. When was it or about how much time had elapsed before you tested the first one of these people?

A. Very few minutes, time necessary to go back to the adjoining room just south in the building of the general assignment squad office and prepare my equipment and so forth for conducting examinations.

Q. You say these people were in the main office of the general assignment office at that time?

A. Yes, sir.

325 Q. Now, you went into the room where the lie detector machinery is and prepared it for use, is that right?

A. Yes, sir.

Q. Then you called or somebody sent you one of the persons out there, is that right?

A. Yes, sir.

Q. And it wasn't this man over here at that time? It wasn't the defendant?

A. No, sir.

Q. All right. When you got through with the first man on the test, did you open the door and come out with him?

A. Yes, sir.

Q. Who was in your office at that time? When I say "your office," I mean the general assignment room. Were there other people still waiting out there?

A. I don't know that they had any particular reason in waiting for me, but there was business being transacted in the office, and several officers there.

Q. Perhaps you misunderstood me, Mr. McCarty. You first saw Milton Mallory, and another man, Luther Mallory, and the defendant?

A. Yes, sir.

Q. And there was somebody else whose name you don't recall?

A. Yes, sir.

326 Q. Those people were in the main office of the general assignment office?

A. Yes, sir.

Q. When you prepared your machinery for use, you either called or somebody sent one of these persons in to see you. When you got through and were ready for the next person, was the next person out there in the assignment office along with the defendant?

A. That is my recollection; yes, sir.

Q. Now, Mr. McCarty, in the room where you have the lie detector machinery, it is not a very big room, is it?

A. No, sir, it isn't.

Q. It is designed to accommodate that machinery, isn't that so, mainly, and give you working room?

A. Primarily so. It was divided from the existing room there for the purpose of conducting examinations.

Q. When you conduct an examination, Mr. McCarty, for instance, you are going to have me as a subject, if I go in that room of course the doors are closed, are they not?

A. There is only one door to this office.

Q. That door is closed, isn't it?

A. And a large window to the outside, east side of the building.

Q. Now, that door connects with the main office?

A. With a hallway leading to the main office. There
327 is a narrow corridor down the building.

Q. Whatever it connects with, once you take a man in for purposes of testing, you close that door, don't you?

A. That is correct, sir.

Q. That's in order to acquire what you call ideal conditions, isn't that a fact?

A. Yes, sir, to eliminate any outside noises or disturbances of any kind.

Q. Can you tell us, can you give us some rough idea of the size of that machine? When I ask you that I mean this: Is it as long as this table is wide?

A. The instrument is $11\frac{1}{2}$ by $12\frac{3}{4}$ by about 18 or 19 inches in length, and weighs 61 pounds. It is imbedded in a desk.

Q. And you say it is imbedded in a desk?

A. Yes, sir.

Q. Does it have any dials or rheostats or controls on it?

A. Yes, it has controls on it.

Q. Could you tell me most nearly what it looks like? Does it look like a dashboard on a car or control panel on an airplane? What does it look like, just roughly?

A. It would be similar in appearance. It is a flat panel about this length [indicating] with the dial that you speak of
328 up in this corner. A series of controls for each of the three components of the instrument. And to the extreme left three recording pins which record on a continuing moving graph.

Q. When one is ready for the testing, when one is all ready for whatever questions you are going to ask him, what sort of connection is there between the subject and machine?

A. There are three components. The pneumograph component requires a hose connection from the instrument to a convoluted tube. That tube is held in place by a little chain reaching around the chest. That is fastened in the visceral section of the body.

Q. You put that around the subject?

A. Yes, sir, to record the breathing.

From the cardial section of the machine, the second component, there is a hose leading to a little wrist cuff that fastens around the wrist the same as a physician would use to check blood pressure.

The third component of the instrument is a psychogalvanometer.

Q. Tell us about that.

A. From the instrument there is a little wire running out to two metal clips of German silver, and those two clips are placed on the fingers with tape around those two to hold them together. That is the connection between the person and the instrument.

329 Q. Now, has he got both hands—let me ask you this: I believe you said there was some sort of hold on one arm with suction pull. That is for the pulse?

A. Blood pressure cuff.

Q. These two connections other than the one that is around the visceral section, are they on one arm, on one separate arm?

A. Usually the blood pressure is on the left wrist. The metal clip is on the right-hand finger.

Q. Now, as a matter of fact, Mr. McCarty, then you ask the individual some questions, is that right?

A. Yes, sir.

Q. Before you ask an individual any questions, you are pretty thoroughly briefed about the alleged charge, are you not, by the other officers?

A. Most times I am. I want all the information that I can get from the investigating officer.

Q. So that in large measure your questions are predicated on the information or the detail of the crime, isn't that so?

A. Yes, sir.

Q. Now, I believe you said that you were with this man for about an hour and a half.

A. Yes, sir.

Q. How long were you with him in that room before you attached that machinery to him?

330 A. I would estimate it about 20 minutes, possibly 25 minutes.

Q. Now, Mr. McCarty, you were talking to him all that time?

A. Yes, sir.

Q. Now, after you disconnected the instruments from him, then you had some further conversation with him?

A. Yes, sir.

Mr. BRYANT. Will Your Honor indulge me one second?

If Your Honor please, I notice that the defendant's mother is in the court room. I would like to have the Clerk tell her to go to the witness room.

The COURT. She is a prospective witness. She should retire to the witness room.

Mr. BRYANT. Will you designate her as Mrs. Mallory?

The DEPUTY CLERK. Mrs. Mallory, will you please step forward and retire to the witness room?

(Mrs. Mallory complied.)

By Mr. BRYANT:

Q. Now, Mr. McCarty, I believe you said that this man made a completely voluntary statement to you. Let me ask you this question: After you detached these instruments from him, did you continue to talk to him?

A. I continued to talk with him, discussing the case, and he continued denying any guilty knowledge in connection with the case for a short period of time.

Q. Did you—excuse me, go ahead.

A. With my assurance to him that the only thing we as police officers working on this case were interested in was truth and fact. I approached him with sympathy and expressed sympathy toward him.

He finally in discussing said that he might or could have done it. Then said, I will tell you exactly what happened.

Q. Now, Mr. McCarty, can you give us a little bit more detail about this sympathy? You said that you expressed sympathy toward him. Did you say that?

A: Yes, sir.

Q. Now, let me ask you this question: Was that expression of sympathy a device, or were you actually sorry for him?

A. I was sorry for him now, then, and I am now. And it was sincere.

Mr. BRYANT. Your Honor, will you indulge me one second?

The COURT. Yes.

407 ANDREW R. MALLORY, the defendant herein, having
been first duly sworn, assumed the witness stand and
testified as follows:

408 Cross-examination by Mr. McLAUGHLIN:

409 Q. You say that you remember seeing Mrs. O'Keane
in the apartment?

A. That is correct

Q. And was that downstairs in the basement apartment?

A. That's right.

Q. Now, you had been living at that apartment, had you not?

A. Yes, sir.

Q. How long had you been living at that apartment?

A. I cannot say definitely.

Q. What?

A. I cannot say definitely.

Q. Give us some idea of how long you were living at the apartment.

A. I would say it was between six and seven weeks.

Q. Six and seven weeks?

A. That is correct.

Q. Where did you come from?

A. I came from Greenville, South Carolina.

Q. When you came up to this address on 12th Street, who was living at this address?

A. My brother Luther Mallory.

Q. Luther Mallory?

A. Yes, sir.

Q. And when you arrived at that apartment, who else was living with your brother Luther?

410 A. My sister was up here and his two sons, I think both of them, three sons at that time I think were living there.

Q. Were living at this apartment?

A. That's right.

Q. That's 1223 12th Street, Northwest, is that right?

A. That's right.

423 Q. When you returned, what time would you say it was, when you returned back to the apartment?

A. Well, I was out about maybe ten minutes.

Q. You were out of the house about ten minutes?

A. That's right.

Q. So that would be what, it would be about twenty minutes to six?

A. That's right.

Q. Is that right?

A. That's right.

Q. Do you know how you arrived at that time?

A. I said I was out about ten minutes.

Q. And then if you were out about ten minutes, what time would it be when you came back?

A. I didn't say no definite time I left. It was between I would say twenty-five after five and six o'clock when I left the house.

424 Q. What time would you say it was when you came back?

A. I don't know.

Q. What?

A. I don't know.

Q. How long had you been out?

A. About ten minutes.

Q. Does that give you any idea when it was you came back?

A. I don't know definitely what time I went out.

Q. I don't mean definitely. Just do a little calculating.

A. I wouldn't say either way.

Q. Either way.

A. But it was before six o'clock.

Q. And when you came back at that time, did you see anybody in the apartment?

A. No.

Q. You were in there all by yourself, is that right?

A. That's right.

Q. Was it at that time that you saw Mrs. O'Keane?

A. That's right.

Q. Now, just tell us, how did you come to see her?

A. I think I was in the kitchen when——

Q. You have to keep your voice up, Andrew. You are dropping it, see?

A. I was in the kitchen when somebody knocked at the
425 door. So I goes to the door and this lady was there, which I didn't know her name at that time. She asked me did I know where they kept their hose. I told her no. So she said that she had her own and she wanted the other one taken off. So I taken it off for her and put it over in another tub. Then I goes back on in the room.

Q. Do you remember how she was dressed at that time?

A. Yes, sir.

Q. How was she dressed?

A. She had on a pair of blue shorts and a pink blouse.

Q. At that time, did you see any wash that she had brought down?

A. Yes, I did.

Q. What did she bring the wash down in?

A. I don't know that.

Q. Where was the wash?

A. Well, it was—it comes out the door on this side. The wash was here, and the washer here [indicating], so I goes around this way. She was standing back over here.

Q. After you fixed the hose on the faucet for her, what did she say to you?

A. She thanked me.

Q. Do you recall what you said to her?

A. Not the exact words; no.

Q. Not the exact words. Well, what was it, something
426 like "Don't mention it," or something like that?

A. It was something like that. I wouldn't say definitely what it was.

Q. And then after you did that, where did you go?

A. I went back in the house.

Q. Back in the apartment?

A. In the apartment.

Q. And when you went back in the apartment, whereabouts in the apartment did you go?

A. The middle room.

Q. The middle room?

A. That's right.

Q. Is that the bedroom?

A. That's the living room and bedroom combined.

Q. What clothes did you have on, that is, when you went—what did you do in the bedroom?

A. What did I do?

Q. This combination you say, living room and bedroom.

A. I sat down.

Q. On what did you sit?

A. Well, I guess some people call it—I don't know what it were. It wasn't a bed, and I have never saw it up, so it might have been a studio couch, but—

Q. Combination affair?

A. That's right.

427 Q. And you sat on that, you say?

A. That's right.

Q. When you sat on it, how long did you sit on that?

A. I can't say definitely.

Q. What?

A. I cannot state definitely.

Q. Did there come a time when you got up from where you were?

A. Sure.

Q. All right. When you got up from where you were, where did you go?

A. In the kitchen.

Q. In the kitchen?

A. That's right.

Q. And what did you do in the kitchen?

A. I got me a drink out there of what was left of it. That's the part that we missed.

Q. What part did we miss, Andrew?

A. The part between 2:30 and 5.

Q. Well, all right. Tell us about it.

A. All right. It was—I won't say definitely, but I hadn't been back from the store for too long when there was a knock on the door. So I goes to the door, and there was a guy standing out there. He asked me was Leo in. I told him no. He asked me was Roosevelt in. I told him no. He said,
428 "Then you must be Andrew."

I said, "That's right."

So he told me his name was Joe. That's all he said, "Joe."

Then I said, "Come on in." So he came on in.

~~We went on back in the living room and sit down.~~ He asked me did I drink. I told him yes, but I didn't make it a habit. So he asked me did I want anything.

I told him yes. So he goes out to the back door and goes up on the corner of 11th and N. At least that's the way I figured he went. There was a whiskey store on the corner of N and 11th and also on 11th and M. So therefore I can't say which one he went to.

Q. Sure.

A. But anyway he was gone for approximately five, maybe six minutes. When he came back he had a pint of whiskey. So I had already gotten the glasses and set them on the table there in the room. He asked me did I have anything to chase it with. So I thought about the Pepsi-Cola that I had. So I told him, Yes, I had a Pepsi-Cola. So I gets up and goes in the kitchen and gets it. And when I come back the whiskey is poured and we began drinking.

And that is the last thing I remember up until around five o'clock.

Now, in the earlier testimony Leo said he got some
429 clothes from me. That I do not remember.

Q. All right. You do remember seeing Mrs. O'Keane in the basement, is that right?

A. Approximately six o'clock.

Q. Approximately six o'clock?

A. That's right.

Q. That was after you drank the whiskey, is that right?

A. As I say, I don't remember anything until around five o'clock.

Q. All right. Let's take five o'clock.

A. So, therefore it must be—I don't know whether I was doped or what. And also in those pants, I had not had on those clothes.

Q. All right. After you saw Mrs. O'Keane in the basement and you fixed the hose, you say you went back to the apartment and sat on this combination daybed?

A. That's right.

Q. How long did you sit there?

A. I couldn't say.

Q. Did you go out of the apartment?

A. I didn't go out of the apartment.

Q. You did not go out?

A. No.

Q. All right. What did you do in the apartment?

A. Well, I sit there and listened to the radio and
430 finished drinking the Pepsi-Cola, as I said.

Q. How long did you stay there?

A. Up until—I don't know exactly what time it were—that Leo did come in and he did say something to me, but I don't recall what it were. But anyway, he asked me where I was going, and I told him around on Tenth Street. So I left. And I goes around and goes on up, and that's when I met Luther.

Q. You met Luther then?

A. That's right.

Q. How long did you stand there talking to Luther?

A. I would say around five minutes.

Q. Was that before you went to Tenth Street or on your return?

A. I was on my way there.

Q. You were on your way?

A. That's right.

Q. And then did you go to Tenth Street?

A. That's right.

Q. And then did you return?

A. That's right.

Q. When you returned to the apartment, who did you see at the apartment?

A. Well, at first I only saw my brother and Roosevelt, which is Luther R., and I don't recall whether Leo was there
431 or not. But anyway—and James, James was there.

Q. That's the boy fourteen?

A. That's right.

Q. By the way, Andrew, what grade did you go to in school?

A. Seventh.

Q. The seventh grade?

A. That's right.

Q. Go ahead. When you came back you say you saw the other boys?

A. I don't recall seeing Leo.

Q. What happened when you came back to the apartment?

A. Well, as I was going down the stairs, before I went in the apartment, I saw I guess you call them squad cars.

Q. Scout cars?

A. That's right.

Q. How did you know it was a scout car?

A. How did I know?

Q. Yes.

A. I am not out in the country. I live in the city, too.

Q. Oh. Go ahead.

A. Well, anyway it was parked out in the front. And as I went downstairs I saw the water and the clothes were still there on the floor. And I had a key. So I opened the
432 door and goes on in. And everybody was back in the back room, so I goes on back there. And I don't remember now who was the first person spoke, but anyway James told me that some woman had been attacked. And then my brother speaks up and says that the man had on a white hat. Well, I had on a white hat myself.

Q. You had on a white hat?

A. That's right.

Q. How about the color of your coat?

A. I had on this same coat here, and the same pants I have on now.

Q. Didn't you have a brown coat on?

A. No, sir.

Q. What clothes did you send to the cleaner's that day?

A. That's exactly what I don't remember. Leo said he got them, but I don't remember giving him no clothes.

Q. That's when you were drinking that whiskey?

A. It was after. It would have to be if he came there. And he said he was there at 5:30, and I don't remember.

Q. When you came back and you saw this crowd around and all this discussion, what happened after that?

A. He told me that this other man had on a white hat. So I said, "I have on a white hat." So I said, "I had better go up and show them my hat."

433 So my brother said, "No, don't you go up there."

So about that time—I don't know whether the officer was down there when I went in there or not—I saw him for the first time there. So he comes in and him and my brother begin talking. What they were talking about I don't know.

Q. Did you leave the apartment?

A. I did.

Q. What time would you say it was that you left the apartment that night of April 7th?

A. I don't know.

Q. What?

A. I don't know. I couldn't say.

Q. Do you know where in the apartment Mrs. Poropat lives, Apartment 4 there on the first floor front?

A. I don't know any of those people that live there.

Q. You don't know any of them?

A. That's right.

Q. In other words, you never did any janitor work around the apartment while you were there?

A. No.

Q. Can you tell us the approximate time that you left the apartment?

A. You mean at night?

Q. Yes; that night after you heard what happened.

434 A. I would say around maybe 8:30 or 9 o'clock.

Q. Where did you go?

A. I couldn't tell you that. I mean —

Q. What?

A. It was—I couldn't tell you that. That's something that I must keep to myself.

Q. Oh, it's confidential?

A. That's right.

Q. All right, I won't go into it then. But you remember where you went, don't you?

A. Sure.

Q. And you remember everything that happened there, too, don't you?

A. I don't.

Q. Just——

A. As I told you——

Q. I will withdraw that question. I won't ask you about something that is confidential.

Do you remember what time you came home that night?

A. I came home that night?

Q. Yes.

A. I never came back there.

Q. Where did you go?

A. As I told you, I cannot tell you.

435 Q. Let me ask you this in a general way: Did you go to another house?

A. That's true. —

Q. And was the house on another street?

A. That's right.

Q. And did you stay there that night?

A. No.

Q. How long would you say you stayed at that house?

A. Up until around one o'clock.

Q. One o'clock. All right. And then when you left that house, did you go to another house?

A. That's right.

Q. And did you stay at that house all night?

A. For the rest of the morning, yes, up until around 11 a. m.

Q. Till about 11 a. m.?

A. That's right.

Q. Let me ask you this general question: Was that house on Owens Street?

A. No.

Q. Is that the house that was on Ingram Street?

A. I don't know the street, but it was my aunt's. She is sitting back there.

Q. Oh, your aunt's house. And you say you left that house about 11 o'clock in the morning?

436 A. That's right.

Q. Where did you go from there?

A. I went to Owen Street.

Q. Owen Street?

A. That's right.

Q. Did you stay at Owen Street until 2:30 that afternoon?

A. I stayed there until the officers arrested me.

Q. And that was about 2:30, wasn't it, Andrew?

A. I don't know.

Q. Well, did you say it was after 11 o'clock, at noon?

A. I am quite sure it was after twelve.

Q. After twelve. You remember the policeman who arrested you, don't you? I mean, you saw him here?

A. Yes, I saw him, but, I don't know his name.

Q. Do you remember when he took the stand his name was Yuter?

A. I remember now.

Q. You remember now.

Then, when he arrested you, where did he bring you?

A. To the No. 1 Precinct, I think it was, headquarters.

Q. No. 1. That's over here on Indiana Avenue?

A. I couldn't tell you the street.

437 Q. Well, you went in and you went up in an elevator, is that right?

A. That's right.

Q. And when they brought you up there, what room did they bring you to, do you remember?

A. The first place I went, as far as I can recollect, was where they fingerprint you and photograph you.

Q. And that's the bureau of identification, they call it, is that right?

A. I guess so.

Q. And do you remember when you were brought in there, what you saw in there?

A. No, I don't.

Q. Can you tell us some of the equipment they had in there?

A. I am afraid I can't.

Q. Did they take your picture?

A. Yes.

Q. What?

A. Yes.

Q. Did they fingerprint you?

A. They did.

Q. And did they put you up against the wall to see how high you were, or how tall, rather?

A. I think they did.

438 Q. And then did they put you on the scale, a weighing scale?

A. I think so. I am not quite sure, but I think they did.

Q. They did all those things. Now, while you were there, did they bring you out of that room, the bureau of identification, after they fingerprinted and photographed you?

A. That's right, they did.

Q. Do you remember what room they brought you to?

A. I don't.

Q. What?

A. I don't remember what room it was. But I know they carried me out of that room into another one.

Q. When they carried you out of that room, do you remember being in a big long hall?

A. I do.

Q. When you went out of that room in this long hall, do you remember going to the office on the opposite side of the hall? In other words, you have to cross the hall to get in there.

A. I went into the room, but I don't think it was an office.

Q. What?

A. I went in a room across the hall, but I don't think it
439 was an office.

Q. You don't think it was an office. Do you remember it had these blue steel desks? Is that what they call them?

A. There wasn't any desk in the room.

Q. There wasn't any desk? What was in the room?

A. Benches along the wall.

Q. Benches along the wall?

A. That's right.

Q. Did you see a desk right in front of you?

A. I didn't.

Q. Behind a rail?

A. I did not see a desk.

Q. You didn't see a desk.

Now, after you were brought in there, did there come a time when you saw Luther and Milton Mallory?

A. If I am not mistaken they were in there when I went there.

Q. Oh, they were in there when you went in?

A. That's right, my brother were also.

Q. And when you saw your brother—that's the father of those two boys, is that right?

A. That's right.

Q. Did you sit down with them?

A. That's right.

Q. You all sat around together?

440 A. That's right.

Q. The police questioned you, did they, at that time?

A. That's right.

Q. Do you remember what police officer questioned you?

A. I don't remember his name, but I saw him on the stand yesterday.

Q. Do you remember whether it was the big fellow, Elliott?

A. It wasn't any big fellow.

Q. Was it Mackie? Well, it was one of those who testified?

A. I don't remember the guy's name.

Q. You don't remember the guy's name. All right. Then you were questioned for how long?

A. I would say around 30 or 45 minutes, between 30 and 45 minutes.

Q. While you were there with Milton and Luther, did there come a time when there was a discussion about a lie detector test?

A. I don't think there were in that room. I am not sure.

Q. It wasn't in that room; right?

A. I am not saying definitely, but I don't believe it were.

Q. How long did you stay in that room before you
441 went to another room?

A. I would say about two and a half hours. Before they questioned me they told me that my brother said that I was the man. And they asked me, Wasn't I. And I told them, No. And they would kill me before they got any statement concerning that as far as my guilt was concerned.

Q. As far as your what?

A. Guilt.

Q. In other words, you were the one that used the word. You said, You can kill me. Is that right?

A. That's right. That's right.

Q. But no one laid a hand on you, did they?

A. No.

Q. What?

A. No.

Q. Then they questioned you, and then did they take you out of that room?

A. They did.

Q. Where did they bring you from that room, Andrew?

A. I don't know the name. I think it's what they call the—I don't know what you call it.

Q. If I mentioned that they call it the general assignment room?

A. It wasn't that room, I don't think.

Q. Was it the sex office?

442 A. I think that's it.

Q. When you went in the sex office did they also bring in Milton and Luther along with you?

A. That's right.

Q. So that the three of you were practically together all afternoon, is that right?

A. That's right.

Q. All together.

And then when you went in the sex office, did they question you in there?

A. Not that I can remember.

Q. Did you have some discussion in there about taking a lie detector test?

A. I think that's where we were when they mentioned the lie detector test.

Q. And Luther was present, and Milton, and your brother was present, wasn't he?

A. I don't recall whether he were present or not.

Q. Did he come in later, do you recall?

A. I don't recall.

Q. While you were in the sex squad room, everybody agreed to take the lie detector test, isn't that right?

A. That's right.

Q. Do you remember whether or not they called a man in that gave the lie detector test?

443 A. I don't recall whether they had to or not. I don't know whether he was there or where he were.

Q. Let me ask it this way, Andrew: Did you hear any talk among the police that the man who gave the lie detector test wasn't there?

A. No, I didn't.

Q. How long did you wait in that room before someone of the three of you left? Do you understand that question?

A. Sure I understand.

Q. All right. You can answer it.

A. I would say maybe. It may have been around two or two and a half hours.

Q. Hours?

A. I am not quite sure.

Q. During that time nobody questioned you, did they?

A. Not that I can recall.

Q. In other words, they were just waiting for the lie detector man, is that right?

A. That's right.

Q. And then there came a time when they brought one of you out, isn't that right?

A. That's right.

Q. Who was the first one out?

A. Milton.

Q. Milton?

444 A. That's right.

Q. How long did Milton stay out of the room?

A. I couldn't say.

Q. Can you give us some idea, maybe?

A. No, I can't.

Q. Would you say it was 45 minutes?

A. As I said, I wouldn't say either way because I don't know.

Q. You don't know?

A. That's right.

Q. All right. When he came back, who went out next?

A. Luther.

Q. Luther?

A. That's right.

Q. And when Milton came back, did he come back in the room where you were?

A. That's as far as I can go on that.

Q. Do you remember how long Milton stayed out of the room?

A. I told you I didn't.

Q. You did not?

A. That's right.

Q. Do you remember Milton coming back in the room?

A. That's right.

Q. All right. And how long would you say he had
445 been out of the room?

A. As I say, I don't know.

Q. Now, after Milton came out of the room, came back into the room, where did you go?

A. I didn't go any place.

Q. Didn't they take you down to the lie detector?

A. I don't know.

Q. What?

A. I don't know.

Q. Well, did you stay in that room in the sex squad office?

A. I don't remember anything from around 6:30 until the next morning.

Q. In other words, you don't remember anything from the time they took Milton out of the room for the lie detector, is that right?

A. Let me tell you this, then you take it from there: They brought us something in. I don't know what it were. But anyway, I ate part of it and drank some of the coffee. And so help me God, that's the last thing I remember until the next morning.

Q. You are telling us they put a Mickey in that?

A. I don't know what it were.

Q. What?

A. I don't know what it were, but I don't remember
446 anything until the following morning.

Q. Is it your idea that there was something in that food or something in that liquid?

A. That's what I believe.

Q. That's what you believe?

A. That's right.

Q. So the fact that you don't remember anything after that, you blame it on something that you ate or drank, is that right?

A. That's my belief.

Q. That's your belief. All right.

And prior to them giving you something to eat and something to drink—and by the way, how many times did you get something to eat and something to drink?

A. Only one time.

Q. Only one time?

A. That's right.

Q. Well, all right. Now, let us take it up until that time, Andrew. Did any of the police strike or beat you in any way?

A. No.

Q. And did the police up until you ate this food and drank this beverage, whatever, why you had been treated kindly by the police?

A. That's right.

447 Q. And there's no one that tried to force you to do anything, did they?

A. Well, I have to answer that question this way: During the time that they was questioning me that afternoon, they made some promises, but I still said I didn't do anything whatsoever about what they were talking about.

Q. All right. Now, let's hear the promises they made to you, Andrew.

A. They said it would go as light—they said they would talk for me and it would go as light as possible on me. But I said that I didn't know what they were talking about.

Q. None of them ever told you that they would let you go free, did they?

A. No.

Q. In other words, they never told you they would put you on the street?

A. No.

Q. What?

A. No.

Q. And in those conversations with you, weren't they, did they say to you, Now, if you tell the truth, we will try to go as light on you as we can?

A. They said, if you come and tell us that you done this thing, we will make it as light as we can on you. And I didn't—
448 I told them I didn't know what they was talking about. And that's when I made the statement that, "You would have to kill me first." Then I couldn't make no statement.

Q. Then you couldn't?

A. And I didn't have any statement to make in the beginning.

Q. You didn't have any to make in the beginning. I just want to get it straight. No one laid a hand on you up until this time?

A. As I said, no one laid a hand on me any time that I know anything about.

Q. And do you remember where you slept that night?

A. As I said before, I don't remember anything until the next morning. I know where I were when I woke up.

Q. All right. Where were you when you woke up?

A. I was in a cell.

Q. What time was that?

A. I couldn't say.

Q. What?

A. I couldn't say.

Q. Do you remember Officer Mackie?

A. No.

Q. You never saw him before in your life?

A. Not that I know anything about.

Mr. McLAUGHLIN. Have you got that statement?

The DEPUTY CLERK. Yes.

449 By Mr. McLAUGHLIN:

Q. Now, I show you, Andrew, Government Exhibit No. 6 and I will ask you to look at the last page. Is that your name?

A. That is my name.

Q. Is that your signature?

A. No.

Q. You deny that it is your signature?

A. I deny it.

Q. Now, here are some initials here on the first page. What is it? What does it say?

A. A. R. M.

Q. A. R. M. Now, whose initials are those?

A. Those are my initials.

Q. Those are your initials?

A. That's right.

Q. On the first page, is that right?

A. That's right.

Q. Why did you initial that?

A. I don't remember initialing anything.

Q. You don't remember?

A. That's right.

Q. But you don't deny that those are your initials?

A. I don't deny that those are my signatures.

Q. And that—

450 A. And that is my initials.

Q. And that is your handwriting, isn't that right?

A. It looks like that. I know this here is not my handwriting here [indicating].

Q. Let's take it one at a time. This here on the first page, the initials, A. R. M.

A. That's my initials.

Q. That's your initials. Well, in addition to your initials, did you write that? Is that your handwriting?

A. It looks something like that, but I don't remember signing it.

Q. You don't remember?

A. That's right.

Q. I will show you page 2 on Exhibit No. 6 and ask if you can identify those initials.

A. They are mine also.

Q. And those initials are what?

A. A. R. M.

Q. Did you put them there?

A. I don't remember.

Q. But that is your writing, is it?

A. As I say, it looks like it.

Q. It looks like it. And this initial here, this name here, A. R. M., Andrew Mallory, you say that's not yours?

A. It don't look like it.

451 Q. It don't look like it. All right, Andrew.

Showing you Government Exhibit No. 6, and on page 2, I will show the initial A. R. M. You say that is your initials and that is your handwriting?

A. That's right.

Q. All right. Now, showing you Government Exhibit 6 and page 3, I will show you "Andrew R. Mallory." You deny that's your signature?

A. I say I don't remember signing it.

Q. Do you deny that that's your signature?

A. I said it didn't look like my signature.

Q. What?

A. I said it didn't look like it.

Q. You deny that it is yours, that you didn't sign it?

A. I said I don't remember signing it.

Mr. TINNEY. Speak a little louder.

The WITNESS. I said I don't remember signing it.

By Mr. McLAUGHLIN:

Q. You don't remember signing it?

A. That's right.

Q. Look at the "R." in A. R. M. on page 2, and the "R." on page 3.

A. I am looking at that.

Q. And I ask you if those weren't made by the same person.

452 A. They are identical.

Q. In the statement, page 1, it says, "I went on back into the apartment and made a pitcher of ice water. I turned the radio up and went back into the same bedroom, I was at first. Then Leo came and I asked him if I had a suit of clothes that he could wear Sunday. So I had a brown checkered and a blue one."

Have you got a brown checkered?

A. I have a brown check and a blue suit.

Q. "And he said that he would put the brown suit and the one he wanted to wear in the cleaner's. So he asked me if I had anything to put in for me to wear and I told him yes. I got a pair of blue checkered pants."

Do you have a pair of blue checkered pants?

A. Not that I know anything about.

Q. Have you got a maroon shirt?

A. Well, I have a couple of maroon shirts.

Q. "Then I got the grey coat."

Do you have a grey coat?

A. I only have this one [indicating].

Q. "But I changed and told him to put the one in—I changed about the blue checkered pants and told him to put the plain blue pants. Leo left to go to the cleaner's."

Who told the police that?

A. They undoubtedly got it from him.

453 Q. Got it from whom?

A. From Leo.

Q. On page 3 it says this: I will start a little ahead so as to get the continuity.

"I went back through the boiler room into the bedroom and laid down for about ten or fifteen minutes. I don't know—before my brother came in. I was changing clothes when he came in. Leo came in right after Luther."

Do you remember that?

A. No.

Q. Do you know where the police got that information?

A. No.

Q. Did you tell the police that?

A. No.

Q. Now, Leo is who?

A. He is my nephew.

Q. What?

A. He is my nephew.

Q. How old is he?

A. I don't know.

Q. Was he purchasing an automobile?

A. Was he purchasing one?

Q. Yes.

A. I don't know.

454 Q. Did he talk to you about a contract he had with a used car dealer?

A. No, he didn't.

Q. Didn't you tell the police "Leo had gotten a contract from a used car dealer, and he asked me to read it for him"?

A. I did not tell them any such thing.

Q. You did not tell them that.

Do you remember Mrs. Smith, the lady who testified here?

A. No.

Q. Do you remember her testifying that she took this down on the typewriter?

A. I remember her testifying.

Q. You deny that happened?

A. I deny that I know anything about any such thing happening.

Q. You what?

A. I say, I deny, that I know anything about any such thing happening.

Q. In other words, it could have happened, but you don't remember it, is that right?

A. I don't remember.

Q. What?

A. I don't think my mind is—I mean I am going to
455 do something and don't know anything about it.

Q. Well, all right. After you say you are going to do something—after you had this eat and drink that the police brought you, you say that after you finished that your mind went a blank, is that right?

A. Undoubtedly I passed out.

Q. You passed out. So that you didn't remember anything until the following morning, is that right?

A. That's right.

Q. What?

A. That's right.

Q. You don't remember whether you signed that or not, do you?

A. That's what I said.

Q. And you don't remember whether you gave this statement to Miss Smith or not?

A. That's what I stated.

Q. Do you remember seeing Dr. Rosenberg, the little doctor who testified here?

A. I saw him yesterday I think for the first time.

Q. Do you remember seeing him?

A. No.

Q. Do you remember him asking you questions?

A. No.

Q. Do you remember him taking your clothes off and
456 examining your body to see if there were any marks or anything on it?

A. No, I don't.

Q. Now, up until the time that you ate this food and drank this liquid, whatever it was, we will call it a beverage, there was nothing the matter with your mind, was there?

A. As far as I can remember; no.

Q. No. And could you understand everything that was going on at that time—couldn't you?

A. I could.

Q. What?

A. I think there was only a few questions that I had to ask when they was questioning me around four. I think it was around four o'clock when they were questioning me.

Q. And you remember everything?

A. I don't remember everything.

Q. Well, outside of that little whiskey you had up in the apartment—I mean, there was nothing the matter with you mentally? That you couldn't remember?

A. Well, what I say on that wouldn't make any difference because I had a psychiatrist—there is no need to tell me this—that every man thinks the other person is crazy but himself. Therefore, I wouldn't say either way. But I don't think I were.

457 I have nothing further.

465

Proceedings of June 24, 1955

Colloquy between court and counsel

The COURT. Will counsel come to the bench, please?

(At the bench.)

The COURT. The Court wishes to inquire of counsel for the defendant whether in his argument to the jury he was raising the issue as to whether the confession was voluntary. I understood something was said on that point, but I don't understand that there is any evidence of involuntariness.

What is the position of counsel for the defendant on that point?

Mr. BRYANT. Well, if Your Honor please, I don't know whether the confession is in the same category as the consent to search the premises or not. I believe that there is a smattering of evidence that there was some involuntary character to it in that he was questioned for quite some time. He denied it. He went into the lie detector room. Of course, Your Honor, I take this position: I take the position that subjecting a man to a lie detector test is in itself psychological pressure. I think it is consistent with—

The COURT. But here he volunteered for the test.

466 Mr. BRYANT. Well, yes, Your Honor. I think this:

I think that my defense of mental competency goes to his inability—

The COURT. I will instruct the jury that confession must be voluntary, of course, but that there is no evidence of any physical coercion of any kind. You will concede that?

Mr. BRYANT. Yes, of course I will.

The COURT. Very well.

We will take our mid-morning recess before I charge the jury.

(Following a brief recess.)

Charge to the jury

The COURT. (Holtzoff, J.). Ladies and gentlemen of the jury: The defendant, Andrew Mallory, is on trial on a charge of rape. It now becomes your duty to determine whether the defendant is guilty or not guilty of the charge on which he is being tried.

The indictment drawn in formal legal phraseology charges that on or about April 7, 1954, within the District of Columbia, Andrew R. Mallory had carnal knowledge of a female named Stella R. O'Keane forceably and against her will.

It is the function of the Court, that is, it is my function and my duty to instruct the jury as to the rules of law that must govern the disposition of this case. You, ladies and

467 gentlemen of the jury, are bound to take the law from the Court and obligated to follow the Court's instructions as to the law, but you, ladies and gentlemen of the jury, are the sole judges of the facts, and you must determine the facts yourselves from the evidence, and solely from the evidence introduced at this trial.

The law authorizes the Court to summarize and discuss the evidence in its instructions to the jury, and to comment on the facts and on the evidence, in order to aid and assist the jury in arriving at its conclusions, but the Court's comments on the facts and on the evidence, and the Court's discussion or summary of the evidence are not binding on you. You need attach to them only such weight as you deem wise and proper.

If your recollection or your understanding of the evidence in any way differs from the Court's recollection or the Court's understanding of the evidence, then it is your recollection and your understanding that must prevail, because as I indicated a moment ago, the final decision on the facts is solely within your domain. My instructions are binding on you only as to the law.

I shall begin my instructions by summarizing a few general principles of law that are applicable to all criminal cases, including, of course, this one. After I have done so I shall pro-

ceed to the consideration of the specific charge involved in this case.

468 First: The fact that a defendant has been indicted and charged with a crime is not to be taken as an indication of guilt, and no inference is to be drawn against him from that fact. An indictment is merely the procedure and the machinery by which a defendant is brought before the Court and is placed on trial.

Second: Every defendant in a criminal case is presumed to be innocent. This presumption of innocence attaches to him throughout the trial.

Third: The burden of proof is on the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense with which he is charged, the jury must find him not guilty. I repeat, the burden is on the Government to prove the defendant guilty beyond a reasonable doubt, but proof beyond a reasonable doubt does not mean proof beyond all doubt whatsoever. It means proof to a moral certainty, and not necessarily proof to an absolute or mathematical certainty.

By a reasonable doubt, as its very name implies, it meant a doubt based on reason, and not just some whimsical speculation or some capricious conjecture.

I can explain the meaning of the phrase "proof beyond a reasonable doubt" in a simple everyday phraseology.

469 Proof beyond a reasonable doubt simply means this: If after an impartial comparison and consideration of all of the evidence you can say to yourself that you are not satisfied with the defendant's guilt, then you have a reasonable doubt. But, on the other hand, if after such impartial comparison and consideration of all the evidence you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is such proof as will result in an abiding conviction of the defendant's guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established the charge against the defendant, you will consider and weigh the testimony of all the witnesses who have testified before you, as well as all the circumstances concerning which testimony has been introduced. Circumstances are frequently very illuminating and cast a light upon the oral testimony.

You are the sole judges of the credibility of witnesses. In other words, it is for you and for you alone to determine whether to believe any witness, and the extent to which any witness should be credited.

470 In reaching a conclusion as to the credibility of any witness, and in weighing the testimony of any witness, you may consider any matter that appears to you to have a bearing on the subject. For example, you have a right to consider the demeanor and the behavior of the witness on the witness stand, the witness' manner of testifying, whether the witness impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, whether the witness has any motive for not telling the truth, and whether the witness has any interest in the outcome of this case.

If you find that any witness testified falsely as to any material fact concerning which the witness could not have reasonably been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of that witness, or any part of the testimony of that witness.

This brings me to a consideration of the specific charge involved in this case. The charge is rape.

Rape is defined in the District of Columbia Code as "Having carnal knowledge of a female forceably and against her will."

The words "carnal knowledge," are synonymous with sexual intercourse. In plain language it may be defined as having sexual intercourse with a female forceably and against her will.

471 Rape or carnal knowledge comprises penetration of the sexual organ of the female by the sexual organ of the male. The slightest penetration is sufficient, and emission is not required.

The law does not permit a conviction on the charge of rape on the basis of the testimony of the complaining witness standing alone. Corroboration of her testimony is required by law. Such corroboration, however, need not be by eye witnesses.

Eye witnesses can hardly ever be obtained in regard to such an offense as is charged in this case.

Corroborating circumstances may be sufficient corroboration. There may be testimony of circumstances which if believed by you, you may, if you deem it wise and proper, to consider in the nature of corroboration.

Now, that brings me briefly to the evidence in this case. I shall briefly summarize the evidence introduced by both parties.

Mrs. O'Keane, the victim and the complaining witness, testified in detail how she was sexually assaulted in the laundry room in the basement of the apartment house in which she lived while she was hanging her laundry there.

Now, to corroborate her testimony that she was raped, the Government introduced the following evidence:

First, that she made an immediate complaint, namely, that she ran upstairs and called out to her husband, "Call 472 the doctor. I have been raped."

The fact that the victim of an alleged rape makes an immediate complaint may be considered by the jury in its discretion as a corroborating circumstance.

Second: There was testimony on the part of her husband and a neighbor and police officers and a physician that she was hysterical, that she was weeping, and disheveled, covered with coal dust, had marks on her throat and scratches on her body.

Then the Government introduced evidence that she was examined shortly thereafter by a physician of the District of Columbia General Hospital who testified that her genital organs were irritated, had been subjected to trauma, which is a medical term for physical violence, and that she had a discharge from her private organs.

He also testified that the patient was nervous and distraught, had abrasions on different parts of her body, and a lump on her head.

Mrs. O'Keane identified on the witness stand the defendant as the person who raped her. That again has to be corroborated. And by way of corroboration, and with the view to corroboration, the Government introduced evidence tending to show the following facts:

First, that the defendant was living in the janitor's 473 apartment, next to the laundry room, and was there on the afternoon or evening on which the rape was committed.

Then the Government offered evidence tending to show that the defendant made an admission, giving all the details that he committed the offense, to Sergeant McCarty of the Metropolitan Police Department; that then he repeated his story to Detectives Tate and Mackie; that later at police headquarters he was confronted with Mrs O'Keane and admitted in front of her that he assaulted her sexually.

Mrs. French, a neighbor of Mrs. O'Keane, was present and testified to that, as well as the police officers.

Finally, the Government introduced a written statement said to have been dictated by the defendant to the police and which was typewritten from his dictation and which he signed in the presence of the witnesses. This statement in which the defendant admits that he committed the offense and described all the details has been read to you.

The defendant, on the other hand, says he doesn't remember anything that happened that evening at police headquarters, and does not remember making the statement or dictating the written statement, or signing it, as the Government contends.

It is for you, ladies and gentlemen, to determine what the facts are, and where the truth lies.

Now, I want to say this, as to confessions: The law 474 admits in evidence a confession if it is freely and willingly made because human experience shows that a confession freely and willingly made is likely to be reliable. Ordinarily a person does not admit that he has committed a crime unless that admission is true.

The situation is otherwise, however, if a confession or admission is obtained by duress or by coercion, physical, mental or moral pressure, or as a result of inducement—if a confession or an admission is obtained by any of these means, it must be rejected and disregarded by the jury.

Now, there is no contention here of any physical coercion of any kind. In fact, the defendant testified in answer to questions, that no one struck him or laid a hand on him, or ill treated him in any way. He testified that he was treated kindly by the police, and that he was given food at the proper time.

Whether this confession is voluntary in the light of all the circumstances is for you to determine.

Now, there is still another issue in this case. It is claimed by counsel for the defendant that the defendant did not have

the mental capacity to commit the crime with which he is charged, and therefore should not be held responsible for it because it is alleged that he was of unsound mind at the time that the crime was committed.

475 If you find this to be the case then your verdict should be not guilty on the grounds of insanity. Your verdict should expressly state in that event that you find the defendant not guilty on the ground of insanity, and not merely not guilty.

It is indeed a rule of law that in certain instances an insane person is not responsible for his acts. In order to be responsible for his acts the person must have the mental capacity to commit the act with which he is charged. It isn't, however, in every case in which the accused is suffering from some mental abnormality or some mental ailment or some mental defect that he is not to be held responsible for his crime. There are many abnormal persons whom the law holds responsible in certain instances for a crime that such a person commits. Obviously there are good reasons for this rule of law. In order not to be held responsible for his acts, and to be found not guilty on the ground of insanity, the following two elements must appear:

First, it must appear that the defendant at the time when the offense was committed was suffering from some mental disease or some mental defect. Or, to put it in a somewhat different way, he must have been suffering from a diseased or defective mental condition at the time that the crime was committed, not at any later time, not at the time of the trial, but at the time that the crime was committed.

Second, it must appear that the crime was the product of this mental disease or mental defect.

476 If you reach the conclusion that the defendant was suffering from a mental disease or mental defect at the time the crime was committed, and also that the criminal act was the result or product of the mental disease or mental defect, you must bring in a verdict of not guilty on the ground of insanity.

On the other hand, if you are convinced beyond a reasonable doubt either that the defendant was not suffering from a mental disease or mental defect, or even if he were so suffering at the time of the commission of the offense, that the crime was not the product or result of a mental disease or mental defect, you

may find him guilty, provided, of course, you are also convinced beyond a reasonable doubt that he committed the act with which he is charged.

Of course, every person is presumed to be sane unless and until the contrary appears. This presumption is founded on human experience. This presumption does not mean, however, that the burden of proof is on the defendant to prove insanity. If the defense offers some evidence that the defendant was legally insane at the time of the commission of the offense, the presumption of sanity vanishes from the case. The burden is then on the Government to establish the sanity of the accused.

In other words, on the issue of insanity or mental incapacity, as it is otherwise called, just as on every other
477 issue in the case, the burden of proof is on the Government, and that burden must be sustained beyond a reasonable doubt.

Now, then, briefly what is the evidence on the issue of mental capacity? Dr. Rom, a psychiatrist, testified that he examined the defendant in July of 1954, three months after the rape was committed, and that he found as a result of a single examination, lasting about an hour, that the defendant was then of unsound mind. He further expressed the opinion that the illness had existed for some time previously, and that therefore the defendant had been of unsound mind in April. But the Doctor added that he could not say so definitely, as he did not examine him in April.

He further testified that in his opinion there is a relation between the mental ailment and the crime.

Now, this expert testimony is admissible and should be weighed and receive consideration, but the expert testimony is not binding on you. It is intended merely to aid and assist you. The decision as to whether the defendant was mentally competent to commit the crime must be made by the jury, and not by the experts.

In reaching that conclusion the jury not only may but should consider all the other evidence in the case, in addition to the testimony of the experts. For example, you have a right to consider the testimony of the police officers who arrested
478 and questioned the defendant, and who testified that in their opinion he acted normally and rationally and was of sound mind.

You have a right to consider the written statement made and signed by the defendant if you find that he made and signed it. And if you find that it is rational, you may consider that as evidence, as bearing on mental competency.

You also have the right to consider the testimony of Dr. Rosenberg, who of course is not a psychiatrist but a general medical practitioner, to the effect that in his opinion, and he examined him on the day that the defendant was arrested, the defendant was not suffering from any mental illness, but was normal mentally.

Now, this question is entirely for your decision on the basis of all of the evidence.

If you find the defendant guilty, you still have one more problem. The punishment provided by law for the crime of rape is either a death penalty or imprisonment for a term of years. The decision whether the death penalty should be inflicted is made by the jury. The jury has the right and the function of determining whether or not the death penalty should be inflicted in a rape case.

Consequently, if you find the defendant guilty as charged, you must then decide also whether the death penalty should be imposed. If you unanimously reach a conclusion that the death penalty should be inflicted; then you may add
479 to your verdict of guilty the words "with the death penalty." In such case, if such is your verdict, it will then be mandatory on the Court to impose the death penalty. The Court will have no discretion in the matter.

On the other hand, if you find the defendant guilty but you do not unanimously reach the conclusion that the death penalty should be inflicted, then your verdict should be simply guilty as charged, without any addition to it.

In that event, the defendant will be subject to imprisonment, which the Court will impose, but will not be subject to the death penalty.

Whether the death penalty should or should not be imposed, in case you find the defendant guilty, is entirely within your discretion, and you have a right to consider any circumstances or weigh any considerations in reaching a conclusion on that point.

Now, I repeat what I said to you at the opening of my remarks. My discussion of the evidence and the facts, and my references to the evidence and the facts are not binding on you.

They are intended merely to be of such assistance as they may be. If your recollection or your understanding of the evidence in any way differs from mine, then it is your recollection and your understanding that must prevail. I have called your attention to such evidence as appears to me to be of some
480 significance. Some of it you may not consider significant.

And on the other hand, there may be other evidence to which I didn't refer that you may consider significant.

You are the sole judges of the facts, and must make your own decision on the facts. That is your function and your responsibility.

In conclusion, I want to say that you may render anyone of four verdicts: Either guilty as charged with the death penalty, or guilty as charged, or not guilty on the ground of insanity, or not guilty.

And as of course you are aware, your verdict must be reached by a unanimous vote.

Are there any objections or requests?

Mr. McLAUGHLIN. No, I have none.

Mr. BRYANT. No, Your Honor.

481 THE COURT. Will counsel come to the bench?
(At the bench.)

The COURT. I want to show you gentlemen a note that I have received from the jury. I think as to the question they ask on No. 2 I shall have to say that I cannot give them any such assurance.

Mr. McLAUGHLIN. That is right.

(In open court.)

482 THE COURT. Who is the foreman of the jury?

THE FOREMAN (Juror No. 8). I am.

THE COURT. Mr. Foreman, the Court has received your note, which reads as follows:

"Have we other choice of verdicts than these four?

"One, guilty with death penalty;

"Two, guilty as charged;

"Three, not guilty by reason of insanity;

"Four, not guilty."

Now, those four are the only possible verdicts. No other verdict is possible.

Then you go on and ask:

"On No. 2 above: Can we the jury be assured that the defendant legally be imprisoned for the remainder of his natural life? No possibility of release——"

I can give you no such assurance. I think I might explain to you that the maximum term the Court can impose is 30 years, but even if the Court imposes the maximum, and of course I can, even if the Court imposes the maximum, the Court also has to impose a minimum sentence. So that the longest term that the Court can impose would be an indeterminate sentence of 10 to 30 years. The minimum has to be not more than a third of the maximum. Then at the end of the minimum sentence the Parole Board would have to decide whether the maximum should be served, or anything less than the maximum.

So that I can give you no assurance that the defendant would legally be imprisoned for the remainder of his natural life if he is found guilty as charged.

Now, your last question:

"May the jury have a reading of the D. C. Code re: rape?"

It reads this way:

"Whoever has carnal knowledge of a female forceably and against her will shall be imprisoned for not more than 30 years provided that in any case of rape the jury may add to their verdict if it be guilty the words 'With the death penalty,' in which case the punishment shall be death by electrocution. Provided further that the jury fails to agree as to the punishment, the verdict shall be received, and the punishment shall be imprisonment as provided in this section."

Have I clearly answered all your questions?

The FOREMAN. Yes, Your Honor.

The COURT. You may retire for further deliberation.

(Thereupon at 4:55 o'clock p. m. the jury retired to further consider their verdict, and thereafter, and at 5:15 o'clock p. m. the jury returned into the box and the following proceedings were had in open court:)

The DEPUTY CLERK. Will the foreman please rise?

484 Mr. Foreman, has the jury agreed upon a verdict?

The FOREMAN. It has.

The DEPUTY CLERK. What say you as to the defendant Andrew R. Mallory?

Verdict

The FOREMAN. Guilty with the death penalty.

The DEPUTY CLERK. Members of the jury, your foreman says that you find the defendant Andrew Mallory guilty, with the death penalty, and that is your verdict, so say you each and all?

(The jury indicated in the affirmative.)

486a [Reporter's Certificate to foregoing transcript omitted in printing.]

499 [File endorsement omitted.]

In United States District Court for the District of Columbia

[Title omitted.]

Verdict

Filed June 24, 1955

On this 24th day of June, 1955, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon the said jury after hearing further of the evidence and the instructions of the Court, alternate jurors Joseph A. Muldoon and Joseph E. Price, are discharged from further consideration in this case; and thereupon the jury retires to consider their verdict.

The jury returns into Court and upon their oath say that the defendant is guilty as indicated and recommends the death penalty; whereupon each and every member of the jury is asked if that is his or her verdict and each and every member thereof say that the defendant is guilty as indicted with the death penalty; and thereupon the defendant is remanded to the District Jail.

By direction of:

ALEXANDER HOLTZOFF,
Presiding Judge, Criminal Court No. 4.

HARRY M. HULL,
Clerk.

By DANIEL J. MENCOBONI,
Deputy Clerk.

Present: United States Attorney.

By ARTHUR McLAUGHLIN,
Assistant United States Attorney.
EVELYN SWEENEY,
Official Reporter.

500 -[File endorsement omitted.]

In the United States District Court for the
District of Columbia

Criminal No. 543-54

UNITED STATES

v.

ANDREW R. MALLORY

Judgment and commitment June 28, 1955

On this 28th day of June came the attorney of the Government, and the defendant appeared in person and by counsel, William A. Bryant and William A. Tinney, Esquires.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of rape, as charged; and the jury having added to their verdict the words "with the death penalty."

And the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

The sentence of the Court is as follows, and it is so adjudged:

Andrew R. Mallory, you have been found guilty upon an indictment charging you with the offense of rape, and, upon the verdict of guilty, you are hereby sentenced to the punishment of death by electrocution; and it is

Ordered that you, Andrew R. Mallory, be forthwith taken to the District of Columbia Jail, otherwise known as the Washington Asylum and Jail, in the District of Columbia, and there be kept in close confinement; and that on the 11th day
501 November 1955 A. D., 1955, you be taken to the place prepared for your execution in the District of Columbia

Jail, and that then and there you be electrocuted according to law; and may God have mercy on your soul.

Further ordered that a certified copy of this judgment and commitment be transmitted by the Clerk of the United States District Court for the District of Columbia to the Superintendent of the aforesaid District of Columbia Jail not less than ten days prior to the time fixed in this judgment of the Court for the execution of the same.

ALEXANDER HOLTZOFF,
Judge.

502

In United States District Court

For the District of Columbia

[Title omitted.]

Motion for a new trial

(Filed June 28, 1955)

Comes now the defendant, Andrew R. Mallory, by William B. Bryant and William A. Tinney, Jr., his attorneys, and moves this Honorable Court for a new trial in the above-captioned matter, and as reasons therefore, states as follows:

1. That the verdict was contrary to the evidence.
2. That the verdict was contrary to the law.
3. That the Court erred in rulings on the admission of evidence.
4. That the Court erred in its instructions to the jury.
5. And for such other and further reasons as may be urged at the hearing of this motion.

William B. Bryant,

WILLIAM B. BRYANT,

615 F Street, N. W.,

William A. Tinney, Jr.,

WILLIAM A. TINNEY, Jr.,

506 5th Street, N. W.,

Attorneys for Defendant.

Certificate of service

[Omitted in printing.]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12915

ANDREW R. MALLORY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 28, 1956.

Mr. William B. Bryant (appointed by the District Court), with whom *Messrs. William C. Gardner, Joseph C. Waddy and William A. Tinney, Jr.*, were on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Mr. Leo A. Rover*, United States Attorney at the time the brief was filed, and *Messrs. Lewis Carroll and Arthur J. McLaughlin*, Assistant United States Attorneys, were on the brief, for appellee.

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges.

PRETTYMAN, Circuit Judge: Appellant was indicted, tried and convicted on a charge of rape. The jury added to the verdict the death penalty.¹

Three points should be discussed. The first point concerns a confession. The rape occurred at about six

¹ 31 STAT. 1322 (1901), as amended, D.C. CODE § 22-2801 (1951).

o'clock in the evening on April 7, 1954, in the furnace room in the basement of the apartment house where the complaining witness lived. The assailant was masked. The janitor's quarters were also in the basement and were occupied by the janitor and his wife, two grown sons, and a younger son. Appellant Mallory, a half brother of the janitor, had also been living in the janitor's quarters for about six weeks prior to the day of the crime. The investigating police officers suspected Mallory and his two grown nephews. Mallory and one of the nephews had left the place immediately after the crime. Mallory was found and arrested at about two-thirty on the afternoon following the crime, April 8th. He and the two nephews were taken to police headquarters and questioned for a short time. At some time after four o'clock all three agreed to take lie detector tests. Some delay occurred while the officer in charge of the polygraph was located. During this interval a meal was served to the three men; no further interrogation occurring during this time. Until the lie detector tests began the three men were together. They were examined one after the other, the two nephews first, and finally, at about eight o'clock, the officer began his examination of Mallory. At about nine-thirty Mallory admitted guilt, describing in detail what had occurred, and immediately thereafter he repeated his account to two other officers. Sometime after ten o'clock the police telephoned the home of the United States Commissioner. That official was not available. At ten-forty-five Mallory was given a physical examination by a deputy coroner and was found to be in good physical condition. Mallory told this officer he had no complaints to make, except for a slight cold; he said he had not been struck or threatened and no promises had been made. At about eleven o'clock he was confronted by the complaining witness. Between eleven-thirty, p.m., and twelve-thirty, a.m., he dictated his confession to a stenographer, who typed it. This typewritten document was admitted in evidence at the trial.

Mallory says his confession was inadmissible under the so-called *McNabb* rule.² We have discussed this rule in recent cases. We think the confession in the case at bar was properly admitted. The delay which occurred between the arrest and the confession was not unreasonable. The police had three suspects, and it is inconceivable that they should be required to lodge charges against any suspect until their investigation has developed with some certainty a justification for charges; provided always that the investigation is not unduly prolonged. Moreover there is no evidence that the confession was due to the delay, such as it was.

The second point concerns a statement made by the court to the jury. After the jury had been deliberating several hours it sent a note to the court. It asked, first, whether it had any choice of verdicts other than the four upon which it had been instructed; i.e., guilty with the death penalty, guilty as charged, not guilty by reason of insanity, or not guilty. The second question was:

"On No. 2 above: Can we the jury be assured that the defendant legally be imprisoned for the remainder of his natural life? No possibility of release —"

The court said:

"I can give you no such assurance. I think I might explain to you that the maximum term the Court can impose is 30 years, but even if the Court imposes the maximum, and of course I can, even if

² *McNabb v. United States*, 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608 (1943).

³ *Pierce v. United States*, 91 U.S. App. D.C. 19, 197 F.2d 189 (1952), *cert. denied*, 344 U.S. 846, 97 L.Ed. 658, 73 S.Ct. 62 (1952); *Allen v. United States*, 91 U.S. App. D.C. 197, 202 F.2d 329 (1952), *cert. denied*, 344 U.S. 869, 97 L.Ed. 674, 73 S.Ct. 112 (1952); *Tillotson v. United States*, — U.S. App. D.C. —, 231 F.2d 736 (1956), *cert. denied*, 24 U.S.L. WEEK 3337 (U.S. June 11, 1956); *Watson v. United States*, — U.S. App. D.C. —, — F.2d — (1956).

14

the Court imposes the maximum, the Court also has to impose a minimum sentence. So that the longest term that the Court can impose would be an indeterminate sentence of 10 to 30 years. The minimum has to be not more than a third of the maximum. Then at the end of the minimum sentence the Parole Board would have to decide whether the maximum should be served, or anything less than the maximum.

"So that I can give you no assurance that the defendant would legally be imprisoned for the remainder of his natural life if he is found guilty as charged."

The third request of the jury was for a reading of the code respecting rape. The judge read the statute which provides that the penalty for rape shall be imprisonment for not more than thirty years, with a proviso that the jury may add to a verdict of guilty the words "with the death penalty".

It is strongly, and with reasonable basis, urged upon us that the above-quoted statement of the trial judge was error. It is said that in the first place a possible sentence, other than the death sentence, was of no concern to the jury, and that in the second place the statement permitted the jury to select the death sentence by comparison with other possible sentences although the jury had before it no data upon which it could evaluate such other sentences. The statement, appellant urges, enabled the jury to fix the death penalty because it did not want the defendant subject to release under any circumstance at the end of ten years. It is argued that the jury should have been required to make its determination as to the death sentence solely upon the basis of data before it, that is, upon the basis of the facts concerning the crime itself.

It is true that imposition of sentence by a judge under modern procedure and the imposition of sentence by a jury rest upon different bases. When a jury fixes the

¹ *Supra* note 1.

sentence for a crime it must do so upon the basis of the information before it. That information consists of the evidence presented during the trial and so is limited to data which is relevant and material to the alleged crime. Hence, when a jury is required to pass upon the death penalty, it must do so upon the basis of evidence concerning the crime itself. But, when a federal judge in modern times imposes sentence after a jury verdict, he has before him a presentence report, which contains the prior criminal record, if any, of the defendant and information about his characteristics, financial condition, and circumstances affecting his behaviour.⁵ Thus in modern penology the element of rehabilitation looms large. The judge chooses the sentence to be imposed upon the basis of much material other than that relating to the crime itself. A jury, under present procedure, cannot make a choice upon that basis.

Forceful though we think the foregoing considerations to be, we think appellant's argument cannot be sustained. Unlike the situation in the ordinary case, the jury had a serious responsibility in respect to punishment for this crime. They had a right to know what the law is upon that punishment. Thus, clearly, they had a right to know that the punishment other than death is imprisonment for not more than thirty years. But the phrase in this statute—"for not more than thirty years"—is not the whole of the law upon the matter; standing alone it is not an accurate reflection of the law. A minimum sentence is required, and parole applies. The trial judge did no more than state accurately the whole law in respect to punishment for this crime. He did not attempt to forecast what might happen or to elaborate in any way. He did no more than state the law upon the point, and the point was one for the jury in this case. We think the jury was not remiss in seeking to know the alternative

⁵ FED. R. CRIM. P. 32(c). See *Williams v. New York*, 337 U.S. 241, 246, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949).

16
sentences as an aid to an intelligent decision upon the problem imposed upon them by the statute; i.e., whether the death sentence was the proper imposition. We think the trial judge was not in error when in response to the request he gave the jury accurately the whole of the law respecting punishment for this offense.

Mallory's third point is that the admission into evidence of articles of clothing worn by him at the time of the alleged crime was error. He relies on *Nelson v. United States*⁸ and *Judd v. United States*.⁹

Immediately after Mallory signed a confession officers questioned him about his clothing. He told them it was in the janitor's apartment, which adjoined the furnace room where the rape occurred. He gave written permission to go to the apartment and get the clothes and accompanied two officers on that errand. The shorts, coat, shirt and trousers bore seminal stains.

Mallory argues that his consent to the search was not clearly shown to have been without duress or coercion. We think it was, and, moreover, the consent was an immediate accompaniment to a confession of the crime and derives color from the confession.⁸ In *Judd* and *Nelson* no confession was involved. Here, since Mallory had already confessed to the crime itself, in the absence of evidence to the contrary his express consent to the taking of specific property involved in the crime must be treated as being of the same voluntary nature. We find no error in this respect.

The judgment of the District Court will be

Affirmed.

⁸ 93 U.S. App. D.C. 14, 208 F.2d 505 (D.C.Cir. 1953), cert. denied, 346 U.S. 827, 98 L.Ed. 352, 74 S.Ct. 48 (1953).

⁹ 89 U.S. App. D.C. 64, 490 F.2d 649 (D.C.Cir. 1951).

¹⁰ Cf. *United States v. Mitchell*, 322 U.S. 65, 88 L.Ed. 1140, 61 S.Ct. 896 (1944).

F

BAZELON, *Circuit Judge*, dissenting: I cannot agree with the court's conclusions that (1) a proper answer was given to the jury's inquiry as to whether a sentence of imprisonment would assure appellant's confinement for the rest of his natural life; and (2) the admission in evidence of the confession was proper under the *McNabb* rule.

I.

It would appear, as the majority says, that it is generally proper for a trial judge to inform the jury of "the alternative sentences as an aid to an intelligent decision upon the problem imposed upon them by the statute." See *Taylor v. United States*, 95 U.S.App.D.C. 373, 379, 222 F.2d 398, 404 (1955). The judge must be ever wary, however, that the efficacy of the additional information be not far outweighed by palpable prejudice to the defendant.

This jury did not request information as to alternative sentences. It requested an *assurance* that if it did not impose the death sentence, the defendant would nevertheless receive a term long enough to make him die in prison; and that his sentence would not thereafter be modified by the judge, or commuted or pardoned by the executive or shortened by the parole authorities. "In the instant case, this is what the jury wanted to know, and its purpose in seeking information is too plain for argument." *Corard v. Commonwealth*, 164 Va. 639, 178 S.E. 797, 800 (1935). The information the judge supplied, in the light of the jury's purpose in requesting it, was grossly prejudicial to the appellant.

II.

Appellant was arrested at 2:30 p.m., but the police made no attempt to bring him before a committing officer until some time after 10:00 p.m., when they telephoned the home of the United States Commissioner and

18
found he was unavailable. Rule 5(a), F.R.Crim.P., requires that an arrested person be taken before a committing officer "without unnecessary delay." As I pointed out in my dissenting opinion in *Green v. United States*,¹ whether a delay is "unnecessary" is determined by the circumstances of the case. Were this a case of unavoidable delay, as in *Green*, I would say, as I did there, that the police might have attempted to legitimize the confession by giving the prisoner, in advance of interrogation, the advisory statement which the commissioner would give him under Rule 5(b). But no advisory statement was made here; and, even if it had been, it could not, in the circumstances of this case, have saved the confession from exclusion under *McNabb*.

The delay in taking appellant before a committing officer was the deliberate choice of the police and not the result of unavoidable circumstances. The arrest occurred during regular business hours and in taking appellant to police headquarters immediately thereafter police passed within earshot of many of the approximately 50 officers, authorized by law to commit accused persons. Clearly the delay was "unnecessary" in the usual sense of the word. In *Akowskey v. United States*, 81 U.S.App. D.C. 353, 158 F.2d 649 (1946), the arrest was made between 3:30 and 4:00 p.m. and "no effort was made by the arresting officers to take the men before a committing magistrate until about 5:00 or 5:30 p.m. when an unanswered telephone call was made to the United States Commissioner's office." We said:

The commissioner and several other committing magistrates before whom the accused might have been taken for a hearing had their offices on or near the axis connecting the place of arrest and the place of

¹ — U.S.App.D.C. —, —, — F.2d —, — (No. 12809, decided this day).

² See 18 U.S.C. § 3041 (1952).

detention. It is only reasonable to conclude that the parties could have been transported to the office of one of these officials in less time than it took to get to police headquarters. It is furthermore both by law and practice true that application for hearing might have been made to any of these committing magistrates at any hour. It follows that the detention was inexcusable and illegal at the outset. [81 U.S. App. D.C. at 354, 158 F.2d at 650]

In the present case the majority hold the delay "not unreasonable," because there were three suspects. They say "it is inconceivable that [the police] should be required to lodge charges against any suspect until their investigation has developed with some certainty a justification for charges."

The policy of discouraging the airing of reckless charges is commendable. But another and more commendable policy is that the police should not arrest any person on mere suspicion,³ hoping that, once they have him at headquarters, they can obtain from his own lips something to justify the arrest.⁴ To me the "inconceivable" thing is that this court should permit detention—for any length of time—for that purpose and without the intercession of a responsible committing officer.⁵ The law lets

"Suspicion is one thing; reasonable cause for suspicion is frequently quite another thing." *United Cigar Stores Co. v. Young*, 36 App.D.C. 390, 404 (1911).

"... the law demands that 'reasonable cause for prosecution of the defendant must exist before his arrest is justifiable.' *Davis v. United States*, 16 App.D.C. 454; *Kirk v. Garrett*, 84 Md. 405, 35 Atl. 1089." *United Cigar Stores Co. v. Young*, 36 App.D.C. 390, 403 (1911). See also *Carroll v. United States*, 267 U.S. 132, 156 (1925): "The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony"

³ In *Watson v. United States*, — U.S.App.D.C. —, —, — F.2d —, — (No. 12675, decided May 3, 1956), the court

policemen arrest, but delegates to magistrates the judgment whether to detain.² The law's requirement of arraignment without unnecessary delay is grounded upon the theory that, where policemen are judges, individual liberty and dignity cannot long survive.³

The police here preferred "to arrest a number of suspects and grill all of them until one admits something which justifies his arraignment." But the law de-

held a written confession to have been improperly admitted in evidence. By way of dictum, it approved the admission of testimony as to somewhat earlier oral confessions. To the extent that this dictum gives a license to police to hold and question an arrested person all through the night, incommunicado, uncounseled and unwarned, for the purpose of obtaining from him the evidence to justify his detention at his eventual arraignment, I disagree with it.

² Rule 5, F.R.CRIM.P.; *McNabb v. United States*, 318 U.S. 332 (1943).

³ "Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U.S. at 343.

⁴ The Federal Bureau of Investigation, on the other hand, arrests no person without informing him that he need not answer questions, that any answers he gives may be used against him, and that he has a right to counsel. See Hoover, *Civil Liberties and Law Enforcement*, 37 IOWA L.R. 175, 182 (1952).

⁵ The requirement of Rule 5 that the police bring prisoners up for arraignment, even before they have what they

gies them that privilege." Detention of prisoners without arraignment "for the very purpose of securing . . . confessions . . . refutes any possibility of an argument" that subsequent arraignment was "without unnecessary delay." *Upshaw v. United States*, 335 U.S. 410, 414 (1948). However "this method of arresting, holding, and questioning people on mere suspicion" may be "in accordance with the usual police procedure of questioning a suspect . . . it is in violation of law, and confessions thus obtained

think is sufficient evidence to satisfy the committing officer that there is "probable cause to believe" the prisoner's guilt, does not leave the police powerless to detect and apprehend criminals. The police may lawfully question witnesses and suspects. True they cannot make people answer their questions, but that they cannot lawfully do even when the suspect is under arrest. The only difference is that they will not have whatever advantage there may be in the automatic coercion of prison bars. If there is any prospect that a person whom the police wish to question may flee or hide (as happened, indeed, in the instant case); they may, upon proper showing, procure an order placing him under bail and, if he fails to give bail, detaining him. Rule 46(b), F.R.CRIM.P. In this connection, it is worth noting that witnesses thus detained under a magistrate's order must be lodged in suitable accommodations to be provided by the Board of Commissioners, "other than those employed for the confinement of persons charged with crime, fraud or disorderly conduct." D. C. CODE § 4-144 (1951).

"Another area of criminal procedure in which ease must yield to propriety was referred to in *Powell v. United States*, 96 U.S.App.D.C. 367, 372, 226 F.2d 269, 274 (1955): "No doubt it would be a boon to prosecutors if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him, isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure."

are inadmissible under the *McNabb* rule." *Ibid.*¹²

Even if it be assumed¹³ that solicitude for the prisoner may sometimes legally justify some postponement of his arraignment, this was not such a case. The postponement here sprang from police solicitude for their prospects of obtaining a confession. They held and questioned three prisoners until one confessed. Then they arraigned the latter and released the other two. This is not unlike the *Akowskey* case where the police arrested, detained and questioned three men who were under the shadow of suspicion, obtained a confession implicating two of them, and then arraigned those two and released the third. And the detention here was just as "inexcusable and illegal."¹⁴

As an additional ground for its holding, the majority relies upon an alleged requirement of the *McNabb* rule of a showing that "the confession was due to the delay." The reliance is apparently upon the dictum of this court

"In striking down the written confession in *Watson*, *supra* note 5, the court reveals the motivation which lies behind such "usual police procedure": "The police undoubtedly knew that once the appellant was presented to a committing authority, they were obliged to file a complaint. But then appellant would have received the benefit of Rule 5(b), and the police were not yet through with him. The attitude, the purpose, could not better be shown than by the Government's argument to the jury. The prosecutor said: 'They say why didn't we put him downstairs [in the cell block] and call him back the next morning. Why? We would find the place crawling with attorneys telling him "You don't have to talk to the police."'" (Slip opinion, p. 9). See also 1 ALEXANDER, THE LAW OF ARRESTS (1949) 628. The oral confessions which were approved *obiter dictum* in *Watson* obviously resulted from the same deprivation of rights which produced the condemned written confession.

¹² See *Watson v. United States*, *supra* note 5, slip opinion, p. 6.

¹³ 81 U.S.App.D.C. 353, 354, 158 F.2d 649, 650 (1946).

in *Watson v. United States*,¹⁶ which was, in turn, based upon dicta in *Allen v. United States*¹⁵ and *Pierce v. United States*.¹⁸ Since the views expressed in all three of those cases were dicta, we are, of course, not bound to follow them in deciding this case. Moreover, our greater deference for the views of the Supreme Court than for our own should prevent us from following these dicta.¹⁷ I cannot agree that a confession produced by police interrogation during illegal detention of the accused can be admissible in a federal court.

After obtaining the written confession from appellant, the police also obtained from him a written consent to a search of the apartment where his clothes were. Certain clothes thus found were admitted in evidence. I agree with the majority's statement that the consent to the search was "an immediate accompaniment to . . . and derives color from the confession." On that account I would hold the one to have been as inadmissible as the other.

For the foregoing reasons, I would reverse the judgment of conviction and remand the case for a new trial.

¹⁵ *Supra*, note 5.

¹⁶ 91 U.S.App.D.C. 197, 202, 202 F.2d 329, 334, *cert. denied*, 344 U.S. 869 (1952).

¹⁷ 91 U.S.App.D.C. 19, 197 F.2d 189, *cert. denied*, 344 U.S. 816 (1952).

¹⁸ *Upshaw v. United States*, 335 U.S. 410, 413 (1948); see *Brown v. Allen*, 344 U.S. 443, 476 (1953); and *Stein v. New York*, 346 U.S. 156, 187-88 (1953).

Before: Prettyman, Bazelon and Bastian, Circuit Judges.

Judgment

(June 28, 1956)

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court, that the judgment of said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 28, 1956.

Per Circuit Judge Prettyman:

Separate dissenting opinion by Circuit Judge Bazelon.

517 [Clerk's Certificate to foregoing transcript omitted in
printing.]

518 Supreme Court of the United States

No. 173 Misc. —, October, 1956

[Title omitted.]

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit.

Order allowing certiorari

(October 22, 1956)

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 521.